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No. 83-245

IN THE
Supreme Court of the United States
October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

JURISDICTIONAL STATEMENT

HENRY ROSE
General Counsel

*BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
TERENCE G. CRAIG
PETER MICHAELS
DAVID F. POWER
Attorneys

OF COUNSEL:

NATHAN LEWIN
Miller, Cassidy, Larroca
& Lewin
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400

PENSION BENEFIT GUARANTY
CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-3010

*Counsel of Record

(i)

QUESTION PRESENTED

Whether, in enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress could provide that it take effect on a date prior to its enactment so as to prevent the frustration of the law's rational purposes.

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Appellants,

v.

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Appellee.

On Appeal From the United States Court of Appeals
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-29a, *infra*) is reported at 705 F.2d 1502. The opinion of the district court (App. B, pp. 30a-49a, *infra*) is reported at 549 F.Supp. 531.

JURISDICTION

The district court had jurisdiction of this action under 29 U.S.C. § 1451(c). The judgment of the court of appeals, holding an Act of Congress unconstitutional, was entered on May 20, 1983. A notice of appeal to this Court was filed

on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1976 and Supp. V 1981), *as amended by* the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208 *et seq.*, are set forth in Appendix F, pp. 76a-104a, *infra*.

STATEMENT

This appeal concerns the constitutionality of the provision of the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), 94 Stat. 1208 *et seq.*, *amending* 29 U.S.C. §§ 1001 *et seq.* (1976), which imposes "withdrawal liability" on employers who withdraw from a multiemployer pension plan¹ prior to the enactment of the Multiemployer Act but after April 29, 1980. 29 U.S.C. § 1381. (Supp. V 1981.) This important date in the legislative development of the Multiemployer Act was incorporated into 29 U.S.C. § 1461(e)(2)(A) as the effective date for the Multiemployer Act's withdrawal liability provisions. (P. 7, *infra*.) In a declaratory judgment action brought by a withdrawing employer who challenged this "retroactivity" clause, the district court granted summary judgment for the defendants, holding that the retroactive effective date was rational and therefore did not deny due

¹A multiemployer plan is one "to which more than one employer is required to contribute" under the terms of "one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C. § 1002(37)(A) (Supp. V 1981). Approximately two thousand such plans provide pension coverage to eight million American workers and their families.

process. (p. 9, *infra*.) The court of appeals reversed on the ground that application of the Multiemployer Act to withdrawals occurring prior to its date of enactment would violate the "employers' rights to due process as guaranteed by the fifth amendment." (Pp. 9-10, *infra*.)

1. Background of the Multiemployer Act

In 1974, after substantial public concern had been expressed over the operation of private pension plans which affected approximately 36 million American workers and their families, Congress enacted ERISA. 88 Stat. 829 *et seq.*, 29 U.S.C. §§ 1001 *et seq.* (1976). This statute comprehensively regulated private pension plans — their funding, management, benefit provisions, and insurance.

Title IV of ERISA created the Pension Benefit Guaranty Corporation (the "PBGC") as a wholly-owned government corporation and an independent federal agency. ERISA assigned to the PBGC the task of administering a program of insurance to cover the payment of certain pension benefits to employees who participated in terminated plans. 29 U.S.C. § 1302(a) (1976). Congress had found that "owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits" 29 U.S.C. § 1001(a), *quoted in Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 362.² The 1974 law prescribed that if a

²For example, when the Studebaker Corporation terminated a plan covering its South Bend, Indiana employees in 1964, over 4,000 vested participants lost 85% of their expected benefits. Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate at 208 and 214.

pension plan subject to Title IV terminated with insufficient assets to provide benefits guaranteed under 29 U.S.C. § 1322, the PBGC would become responsible for payment of those guaranteed benefits. 29 U.S.C. § 1361.

For plans that were maintained by a single employer, the PBGC's obligation to pay guaranteed benefits was effective for plans that terminated on or after July 1, 1974. 29 U.S.C. § 1381 (1976). The guaranteed payment of multiemployer plan benefits, however, was not to be mandatory until January 1, 1978. 29 U.S.C. § 1381(c)(1) (1976). In the intervening period, the PBGC was authorized to determine whether to pay such benefits upon plan termination on a case-by-case basis. 29 U.S.C. § 1381(c)(2) (1976).

Title IV imposed liability to the PBGC upon an employer that terminated a single-employer plan, up to the full amount of the plan's statutory insufficiency. 29 U.S.C. § 1362(b).³ Where the PBGC exercised its discretion to pay guaranteed benefits due under a terminated

³The courts of appeals have repeatedly rejected constitutional challenges to ERISA's imposition of liability on employers that terminate single-employer plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), cert. denied on constitutional question, cert. granted on statutory question, 442 U.S. 940 (1979), aff'd, 446 U.S. 359 (1980) reh'g denied, 448 U.S. 908 (1980); *Pension Benefit Guaranty Corp. v. Quimet Corp.*, 630 F.2d 4 (1st Cir. 1980), cert. denied, 450 U.S. 914 (1981); *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013 (6th Cir. 1980). Additionally, several lower courts have concluded that this Court, *sub silentio*, upheld the constitutionality of single-employer liability in its affirmation of the Seventh Circuit's statutory holding in *Nachman*. *A-T-O*, *supra*, 634 F.2d at 1024; *Peick, v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1040 (N.D. Ill. E.D. 1982) (Getzendanner, J.) (7th Cir. Appeal No. 82-2081 pending); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404, 406 (S.D. N.Y. 1982) (Sprizzo, J.) (2nd Cir. Appeal No. 83-7004 pending).

multiemployer plan, employers that had contributed to the plan during the five-year period preceding its termination were subject to liability to the PBGC, up to the plan's statutory insufficiency, in amounts proportional to their share of the plan's contributions during that period. 29 U.S.C. § 1364 (1976). Thus, after the enactment of ERISA in 1974, any employer withdrawing from a continuing multiemployer plan was subject to a contingent funding liability which depended only upon whether the plan survived the next five years and on whether the PBGC assumed discretionary responsibility to pay the plan's guaranteed benefits.

In 1977, Congress became concerned that the January 1, 1978 implementation of mandatory guarantees for multiemployer plans might induce several large multiemployer plans to terminate, subjecting the insurance system to a liability that would have "an adverse impact on the entire private pension system." 123 Cong. Rec. S18637 (daily ed. November 3, 1977) (statement of Sen. Bentsen). Congress directed the PBGC to prepare a comprehensive report analyzing the problems of multiemployer plans and it delayed the effective date of the mandatory guarantees, extending the PBGC's discretionary authority through June 30, 1979. Pub. L. 95-214, 91 Stat. 1501 (1977). (App. G, pp. 105a-106a, *infra*.)⁴

⁴The effective date for mandatory coverage of multiemployer plans was subsequently deferred to May 1, 1980 (93 Stat. 70 (1979)), to July 1, 1980 (94 Stat. 341 (1980)), and to August 1, 1980 (94 Stat. 610 (1980)). It was then superseded by enactment of the Multiemployer Act.

2. Enactment of the Multiemployer Act

The PBGC submitted its report to Congress on July 1, 1978. The report emphasized the danger that employer withdrawals would weaken the contribution bases of multiemployer plans, interrupting the stream of contributions supporting employee vested benefits, subjecting remaining employers to increased obligations, and precipitating further withdrawals. Ultimately, employer withdrawals might compel plan terminations and, as a consequence, greatly increase the obligations of the insurance system. Such obligations, funded through the payment of premiums, could require exorbitantly high premium increases affecting all employers who contribute to multiemployer plans. In order to discourage employer withdrawals and to mitigate the impact of withdrawals that occurred, the PBGC proposed that a withdrawing employer be subject to a fixed liability on withdrawal equal to the employer's proportional share of a plan's unfunded vested liability, i.e., the amount by which the actuarial value of vested benefits exceeded plan assets. (App. H, pp. 115a-116a, *infra*.) Such defined withdrawal liability was included in the legislative recommendations submitted to Congress by the PBGC on February 27, 1979. 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (statement of Sen. Javits).

Congress was concerned that employers would be encouraged to withdraw prior to enactment in order to avoid withdrawal liability, thereby shifting their funding obligations to remaining employers, and precipitating the financial erosion of multiemployer plans the proposed amendments were designed to prevent. In order to prevent employers from preempting the will of Congress, the bills introduced specified February 27, 1979 — the day of the

PBGC's transmittal of its proposed legislation — as the effective date for the new withdrawal liability formula. That date was included in the bills introduced in both Houses on May 3, 1979. H.R.3904, 96th Cong., 1st Sess. § 108; S.1076, 96th Cong., 1st Sess. § 108.

By April 29, 1980, substantially identical bills had been approved by two Committees in the House and one in the Senate, all with the originally suggested effective date for withdrawal liability. When the Senate Finance Committee, the last of the four congressional committees responsible for the legislation, indicated it needed more time, Congress delayed the mandatory payment of multiemployer plan benefits provided in ERISA from May 1 to July 1, 1980 (see note 4, *supra*). The Finance Committee stressed, however, that it did not want to encourage employers to withdraw from multiemployer plans while additional work was being done on the bill. Senator Bentsen, who was chairman of the Subcommittee on Private Pension Plans, said on the Senate floor on April 29, 1980:

The feeling of the Senate Finance Committee was that this bill should not encourage employers to withdraw from a multiemployer plan between now and July 1, 1980. Any withdrawals after April 28, 1980, will be covered by any withdrawal liability rules that the committee might adopt. 126 Cong. Rec. S4302-03 (daily ed.)

The Senate Finance Committee then proposed a delay of the effective date of the withdrawal liability provisions from February 27, 1979 to April 29, 1980. On May 22, 1980, the House passed its version of the bill by a vote of 374-0. 126 Cong. Rec. H4170 (daily ed.). The Senate passed its version by a vote of 85-1 on July 29, 1980. 126 Cong. Rec. S10169 (daily ed.). President Carter signed the Multiemployer Act into law on September 26, 1980.

3. The Facts of this Case

Under a series of collective bargaining agreements with the Oregon State Council of Carpenters, beginning in 1964, the appellee ("Gray"), a construction industry employer, contributed to co-appellant Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund"), a multiemployer pension plan. In February, 1980, Gray notified the union that it would not renew its collective bargaining agreement. (App. B at 32a, *infra*.) That agreement expired on May 31, 1980, and Gray's contributions to the Trust Fund ceased on that date.

On July 24, 1981, the Fund's trustees formally notified Gray, pursuant to the Multiemployer Act, that Gray was deemed to have withdrawn from the Trust Fund as of June 1, 1980, and that its withdrawal liability was \$201,359. Payment pursuant to a quarterly schedule, as authorized by 29 U.S.C. § 1399, was demanded.

4. The Litigation

Gray instituted a declaratory judgment action in the United States District Court for the District of Oregon on September 29, 1981. Gray's action named the PBGC and the Trust Fund as defendants. Choosing not to challenge the amount of its liability (which was subject to compulsory arbitration under 29 U.S.C. § 1401),³ Gray maintained that the Multiemployer Act could not constitutionally impose withdrawal liability on employers who had terminated their participation in a multiemployer pension

³Gray initially sought a preliminary injunction against enforcement of the Multiemployer Act. The district court denied the injunction and ruled that constitutional issues would be resolved only after the amount of Gray's liability had been determined through the exhaus-

fund prior to the effective date of the Multiemployer Act.⁶ On cross-motions for summary judgment, the district court (Redden, J.) found that "Gray has not shown that the [Multiemployer Act] and its retroactive application are irrational solutions to a serious problem." 549 F.Supp. at 538. (App. B at 43a, *infra*.) The court held the Multiemployer Act constitutional and entered judgment for the defendants. 549 F.Supp. at 540.

The court of appeals reversed in an opinion which was rendered in this case and in five related appeals growing out of other litigation.⁷ Weighing the "reliance interests" of employers subject to the Multiemployer Act, the court found that it "was not certain . . . that the Amendments Act would be enacted and would have a retroactive

tion of statutorily mandated arbitration proceedings. Gray then asked the trustees to review their determination, as provided in 29 U.S.C. § 1399 (Supp. V 1981). After the original determination was reviewed, Gray accepted that determination and did not request arbitration under 29 U.S.C. § 1401 (Supp. V 1981). 549 F.Supp. at 534. (App. B at 33a, *infra*.)

⁶Gray also challenged the compulsory arbitration provision on the ground that it violated procedural due process and the constitutional guarantee of trial by jury. However, the district court held that because Gray had waived its right to arbitration, it lacked standing to challenge the constitutionality of the statutory procedures. 549 F.Supp. at 539. (App. B at 46a, *infra*.)

⁷The PBGC was not made a party in the district court at the inception of the other litigation. In a portion of the opinion dealing only with that case, the court of appeals considered and decided questions relating to the timeliness of the PBGC's motions to intervene. (App. A, pp. 10a-13a, *infra*.) Those issues are not, of course, subject to a right of appeal under 28 U.S.C. § 1252, and they will be presented to this Court, if necessary, through other appropriate procedural avenues.

effect," and it therefore rejected the proposition that "employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect." (App. A at 19a, *infra*.)

The court of appeals then balanced the equities of the Multiemployer Act, challenging the wisdom of Congress. The court of appeals principally relied on *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), which, according to the court, resembled this case in that "a harsh burden [was] imposed upon the employers for a completed transaction." (App. A at 24a, *infra*.) Finding also that the effective date for withdrawal liability in the Multiemployer Act was "arbitrarily fixed" and that "[o]ther legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans" (App. A at 25a, *infra*) the court concluded that the Fifth Amendment's Due Process Clause was violated by the Multiemployer Act's retroactivity.

THE ISSUE IS SUBSTANTIAL

The fact that the court of appeals, in a six-page discussion, invalidated a law of Congress adopted with virtual unanimity would itself be sufficient grounds to warrant plenary review by this Court of the decision below.⁸ In addition, however, this case satisfies the standards which ordinarily govern discretionary review under Rule 17 of this Court's Rules. The decision rendered by the Ninth Circuit conflicts with the rationale of rulings of other federal

⁸The Multiemployer Act was adopted after lengthy consideration by Congress, with the support of a broad coalition of business, labor, and public interest groups. 126 Cong. Rec. S10100 (daily ed., July 29, 1980) (statement of Sen. Javits).

appellate and trial courts and it is inconsistent with applicable decisions of this Court. Moreover, the Ninth Circuit has erroneously decided an important question of federal constitutional law that should be ruled on by this Court.

1. The effect of the Ninth Circuit's decision is substantial and, if left undisturbed, will have significant harmful consequences.

During the five-month period between April 29, 1980, and September 26, 1980, a considerable number of employers who had been contributing to multiemployer pension plans terminated their association with such plans. More than 70 such employers who were assessed withdrawal liabilities have filed lawsuits challenging the constitutionality of the retroactivity of the Multiemployer Act.⁹ The total withdrawal liability assessed in these suits is \$64,609,110. Consequently, this case is not a unique dispute involving a single employer. Widespread application of the Ninth Circuit's decision would result in the transfer of a large funding responsibility from withdrawn employers to those still contributing to their plans. Furthermore, the rationale applied by the Ninth Circuit casts doubt on Congress' power in the future to fix effective dates for legislation during the course of legislative debate and to discourage last-minute actions designed to frustrate the effect of new laws.

⁹App. E, pp. 53a-75a, *infra*, is a list of the actions known to the PBGC that are now pending in various federal courts. The list does not include numerous collection actions for withdrawal liability instituted by pension trusts to which withdrawing employers have interposed constitutional defenses.

2. The Ninth Circuit's decision is inconsistent with decisions of the Second Circuit and of the Court of Claims.

The central issue in this case is whether Congress may rationally act to discourage last-minute efforts to nullify the economic impact of legislation that is on the verge of enactment, by announcing that a pending bill, if enacted into law, will take effect as of a date during the final stages of Congress' deliberation, and then incorporating that date into law. The issue is further narrowed by the special circumstances in this case surrounding the imposition of a retroactive effective date; (1) such a provision had been a consistent feature of this legislation during two years of consideration and (2) the date finally enacted into law was advanced by some 14 months, thereby coinciding with major congressional committee action. It is, therefore, readily apparent that the issue in this case is not whether Congress may select an arbitrary date in the distant past, before challenged legislation has been introduced or considered, and make the law apply as of the earlier date.

A strikingly similar problem confronted Congress in 1963 and 1964, when the Executive Branch, in order to limit the flow of capital from the United States, sought to impose an excise tax on foreign-issue stock purchased by American citizens. On July 18, 1963, President Kennedy sent a message to Congress accompanied by proposed legislation which became the Interest Equalization Tax Act of 1964, 78 Stat. 809, Pub. L. No. 88-563 (Sept. 2, 1964), 26 U.S.C. §§ 4911 *et seq.* The bill, which was not finally enacted until September 2, 1964, applied to all transactions occurring after the date of President Kennedy's message, making the statute effectively "retroactive" by almost 14 months. Pub. L. No. 88-563, § 2(c); S. Rep. No. 1267, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. CODE CONG & AD. NEWS 3478, 3486, 3500.

In *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), cert. denied, 407 U.S. 920 (1972), individuals who had been criminally convicted for evading the Interest Equalization Tax challenged its retroactivity. The Second Circuit upheld the statute's constitutionality, deferring to Congress' justification for the law's retroactivity: "[t]o curb the capital flow while Congress was considering the legislation and to avoid arbitrage speculation." 453 F.2d at 806.¹⁰

By the same rationale, the Court of Claims upheld the retroactivity of the 1964 law in *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct. Cl. 1970), cert. denied, 398 U.S. 950 (1970). The court said (420 F.2d at 730, footnote omitted):

[I]t is our view that where there is a reasonable cause to believe or expect that a tax will be imposed on a presently nontaxable transaction, the retrospective application of such tax does not constitute a denial of due process.

The effective date for termination liability under the Multiemployer Act was no surprise to those who were subject to it. Federal courts other than the Ninth Circuit have observed that during the five-month period between April

¹⁰The Second Circuit quoted approvingly a commentator's observation that "a prospective date for the Interest Equalization Tax would have made it a fruitless — if not counterproductive exercise. . . . Without a retroactive effective date from the time of announcement, the outflow of capital in an extremely short period of time would have been so great that Congress could not have afforded to act." Note, 84 HARV. L. REV. 436, 445 (1970). Here, similarly, retroactive application was necessary "to prevent employers from withdrawing in droves from multiemployer plans once they anticipated passage of [the Multiemployer Act]." *Coronet Dodge, Inc. v. Speckmann*, 553 F. Supp. 518, 521 (E.D. Mo., E.D. 1982) (Filippine, J.) (8th Cir. Appeal No. 82 2554-EM).

29, 1980 and the date on which the Multiemployer Act became law "there was strong evidence to suggest that [the Multiemployer Act] was likely to pass and that it would be retrospective when it did." *Peick v. Pension Benefit Guaranty Corp.*, 539 F.Supp. 1025, 1053 (N.D. Ill. E.D. 1982), *appeal pending*, No. 82-2081, 7th Cir. Noting that it was "hardly credible" that an employer had no actual notice of such retroactivity, another court said that "[an employer's] ignorance must have resulted from a culpable failure to acquaint itself with information publicly available." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404, 409 n.8 (S.D. N.Y. 1982), *appeal pending*, No. 83-7004, 2d Cir.¹¹ In

¹¹Both the *Peick* and *Textile Workers* decisions upheld the Multiemployer Act in its entirety, including its retroactive application, as have the great majority of district court decisions. See also *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 3 Employee Benefits Cases 2545 (E.D. Va. 1982); *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 81-C-4535 (N.D. Ill. 1983); *Coronet Dodge, Inc. v. Speckmann*, 553 F. Supp. 518 (E.D. Mo. 1982); *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982); *Bakersfield Concrete Construction, Inc. v. Construction Laborers Pension Trust for Southern California*, C.A. No. 82-0044-WPG (C.D. Ca. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, C.A. No. 82-4092-SAW (N.D. Ca. 1983); *Speckmann v. Paddock Chrysler-Plymouth, Inc.* No. 82-0888-C(C) (E.D. Mo. 1983); and *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F. Supp. 531 (D. Or. 1982). But see *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983); *Grano Steel Corp. v. Shopmen's Ironworkers Pension Plan of Southern California*, C.A. No. CV 81-5862-LEW (C.D. Ca. 1982); *Republic Industries, Inc. v. New England Teamsters Fund*, No. 81-2551-S (D. Mass. 1983); and *Sibley, Lindsey & Curr Co. v. Bakery, Confectionery and Tobacco Workers Union*, C.A. No. 82-555T (W.D. N.Y. 1983). The Multiemployer Act's post-enactment operation has been upheld by every court that has considered a constitutional challenge to it.

these circumstances, the constitutionality of the "retroactive" application of the Multiemployer Act's withdrawal liability provisions is supported by the constitutionality of the Interest Equalization Tax Act of 1964. The decision of the Ninth Circuit conflicts with the rulings upholding the 1964 law.¹²

Cleveland Metal Products Co., Inc. v. Teamster Local No. 507 Pension Fund, C.A. No. C81-2543 (N.D. Ohio, E.D. 1983); *Eberhard Foods, Inc. v. Retail Store Employees Union AFL-CIO and Food Employees Joint Pension Fund*, C.A. No. G-82-23 CA1 (W.D. Mich. S.D. 1983); *S & M Paving, Inc. v. Construction Laborers Pension Trust for Southern California*, 539 F. Supp. 867 (C.D. Ca. 1982); *Victor Construction Company, Inc. v. Construction Laborers Pension Trust for Southern California*, 3 Employee Benefits Cases 1763 (C.D. Ca. 1982); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 4 Employee Benefits Cases 1145 (D.D.C. 1983); *Kinsora, v. Vornado, Inc.*, C.A. No. 82-1034 (D.N.J. 1983); *IUE AFL-CIO Pension Fund v. Erie Universal Products Corp.*, C.A. No. 82-2252 (D. N.J. 1983); *Trustees of Retirement Fund of Fur Manufacturing Industry v. Lazar-Wisotzky, Inc.*, No. 82-CIV-0880 (LBS) (S.D. N.Y. 1983); and *Republic Industries, Inc. v. New England Teamsters Fund*, *supra*.

¹²The constitutionality of this kind of retroactivity is not limited to statutes that may be characterized as "tax laws." The same reasoning as governs "tax laws" is applicable, as well, to any form of economic regulation, particularly one in which liability is imposed to insure that the reasonable contractual expectations of a large segment of society — such as the employers that continue to contribute to multiemployer plans and the participants in those plans — are realized. Indeed, the Court of Claims in *First National Bank in Dallas, supra*, emphasized that the Interest Equalization Tax Act was principally a *regulatory* enactment rather than a revenue-producing law, and concluded that the Act's regulatory purpose strengthened the case for its retroactive application. 420 F.2d at 729-30. See also *Gifford v. Thorp Finance Corp.*, 688 F.2d 447, 458 & n.13 (7th Cir. 1982) (*en banc*). (This Court's decision in *U.S. v. Security Industrial Bank*, ___ U.S. ___, 51 U.S.L.W. 4007, while displacing the Seventh Circuit's ruling in *Gifford*, is not inconsistent with *Gifford's* due process analysis.)

3. The Ninth Circuit's decision conflicts with this Court's authoritative rulings on retroactivity.

On a number of occasions, this Court and other courts have approved laws with retroactive effective dates,¹³ as well as laws retroactive not in form but in their effect on closed transactions.¹⁴ As this Court observed in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976):

¹³See, e.g., *United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam) (retroactive application of minimum tax provisions of Internal Revenue Code amendments); *Lichter v. United States*, 334 U.S. 742, 777, 789 (1948) (October 1942 amendments to Renegotiation Act made retroactive to date of original act in April 1942); *Fleming v. Rhodes*, 331 U.S. 100 (1947) (Price Control Extension Act backdated to cover time when original Emergency Price Control Act had expired); *United States v. Hudson*, 299 U.S. 498 (1937) (retroactive application of federal tax on silver trading); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 374 F.2d 516, 525, n. 10 (Ct. Cl. 1967) (Renegotiation Act passed in September 1954 backdated to first of year); *Eastern Machinery Co. v. Under Secretary of War*, 182 F.2d 99, 100 (D.C. Cir. 1950) (July 1943 amendment to Reconstruction Act held constitutionally made retroactive to April 1942).

¹⁴See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (black lung benefits extended to coal miners who had quit jobs before legislation enacted); *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (Congressional modification of a statute of limitations could apply retroactively to revive barred action); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (state depression statute to protect homeowners from foreclosure held not to violate due process even though it affected already existing mortgages); *Gifford v. Thorp Finance Corp.*, *supra*, n.12, (exemption of household goods from lien, as provided for by Bankruptcy Reform Act of 1978, held constitutionally applicable to loan agreement entered before bankruptcy act enacted); *Travelers Insurance Co. v. Marshall*, 634 F.2d 843 (5th Cir. 1981) (expansion of death benefits for longshoremen held constitutionally applicable to those injured before amendment expanding benefit was enacted; (see also cases cited in *Travelers* upholding the law in other circuits); *United States v. Perry*, 431 F.2d 1020 (9th Cir. 1970) (1960 Amendment to Anti-Kickback Act held applicable to kickback made ten years earlier).

It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . . And this court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee [O]ur cases are clear that legislation readjusting right and burdens is not unlawful solely because it upsets otherwise settled expectations.

This Court sustained the Act of Congress which was challenged on retroactivity grounds in *Usery v. Turner Elkhorn* because it concluded that the retrospective imposition of liability was "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." 428 U.S. at 18. This was true even with respect to parties who were unaware at the time of the factual basis for their liability and who had relied on the prevailing state of the law. Here, by comparison, the enactment of ERISA in 1974 provided employers with unmistakable notice that they might be required to continue to fund the benefits promised by the plans to which they contributed.¹⁵ The imposition of

¹⁵As the district court in this case noted, "the [pension] plan itself recognized that the employers' obligations were subject to statutory modification." 549 F.Supp. at 537. (App. B at 39a, *infra*.)

withdrawal liability on employers who terminated their participation in pension plans after the Senate Finance Committee's announcement — when it was clear that the Multiemployer Act was on the verge of adoption — was surely a “rational” allocation of economic burdens among employers involved in multiemployer pension funds.

Moreover, this Court in *Usery v. Turner Elkhorn* sharply limited the principal authority on which the Ninth Circuit relied — *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), implying that *Alton's* holding now lacks “vitality”. 428 U.S. at 19. In any event, the retroactivity found objectionable in *Alton* was the statutory creation of “gratuities” and additional payments “for services fully compensated” from employers to already separated employees who had never been promised pension benefits, much less acquired vested rights to such benefits. 295 U.S. at 349. No such narrow objective is involved here. Not only does the Multiemployer Act seek to protect vested benefits,¹⁶ but the purpose of its limited retroactive period was to prevent its impending enactment

¹⁶The court of appeals also cited and relied upon *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), in finding the Multiemployer Act's retroactivity provision to be unconstitutional. (App. A, pp. 23a-26a, *infra*.) But that case involved a Contracts Clause challenge to a state law which (1) was a new attempt at regulation apparently directed at one employer, (2) affected rights that had not vested, and (3) contained no provisions moderating the law's harsh implementation. The Multiemployer Act, on the other hand, presents no Contracts Clause issues, deals with a benefit guarantee program that had been in effect for six years, protects vested rights, and includes provisions specifically designed to moderate its retroactive impact. 29 U.S.C. §§ 1387 and 1397 (Supp. V 1981), as well as numerous other moderating provisions of general applicability. The Seventh Circuit in *Nachman*, *supra*, and several district courts considering challenges to the Multiemployer Act distinguished both *Alton* and *Allied* on the basis of these considerations.

from precipitating withdrawals from and financial jeopardy to multiemployer plans. That goal, besides being rational, was critical to the remedial program first established by Congress in 1974.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

HENRY ROSE

General Counsel

BARUCH A. FELLNER

Associate General Counsel

J. STEPHEN CAFLISCH

Special Counsel

PETER H. GOULD

TERENCE G. CRAIG

DAVID F. POWER

Attorneys

OF COUNSEL:

NATHAN LEWIN

Miller, Cassidy, Larroca

& Lewin

2555 M Street, N.W., Suite 500

Washington, D.C. 20037

(202) 293-6400

PENSION BENEFIT GUARANTY

CORPORATION

2020 K Street, N.W.

Washington, D.C. 20006

(202) 254-3010

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SHELTER FRAMING CORPORATION,)

Plaintiff/Appellee,)

No. 82-5271

) D.C. No. CV 81-4457-IH

and)

**CARPENTERS PENSION TRUST FOR)
SOUTHERN CALIFORNIA,)**

Defendant/Appellee,)

v.)

**PENSION BENEFIT GUARANTY)
CORPORATION,)**

**Applicant for Intervention/)
Appellant.)**

**FILED
MAY 20 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS**

**G & R ROOFING COMPANY, a)
California Corporation,)
Plaintiff/Appellee,)**

) No. 82-5272

) D.C. No. CV 81-5551-IH

and)

**CARPENTERS PENSION TRUST FOR)
SOUTHERN CALIFORNIA,)**

Defendant/Appellee,)

v.)

**PENSION BENEFIT GUARANTY)
CORPORATION,)**

**Applicant for Intervention/)
Appellant.)**

SHELTER FRAMING CORPORATION,

Plaintiff/Appellee,

v.

CARPENTERS PENSION TRUST FOR

SOUTHERN CALIFORNIA,

Defendant/Appellant.

No. 82-5460

D.C. No. CV 81-4457-IH

**RECEIVED-PBGC
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GENERAL COUNSEL**

G & R ROOFING COMPANY,

Plaintiff/Appellee,

v.

CARPENTERS PENSION TRUST FOR

SOUTHERN CALIFORNIA,

Defendant/Appellant.

No. 82-5461

D.C. No. CV 81-5551-IH

G & R ROOFING COMPANY,

Plaintiff/Appellant,

v.

CARPENTERS PENSION TRUST FOR

SOUTHERN CALIFORNIA,

Defendant/Appellee.

No. 82-5462

D.C. No. CV 81-5551-IH

R.A. GRAY AND CO.,

Plaintiff/Appellant,

v.

OREGON-WASHINGTON

CARPENTERS-EMPLOYERS

PENSION TRUST FUND AND

PENSION BENEFIT

GUARANTY CORPORATION,

Defendants/Appellees.

No. 82-3506

D.C. No. CV 81-912-JAR

OPINION

Argued and Submitted December 7, 1982
Decided May 20, 1983

Appeals from: The United States District Court
for the Central District of California
Hon. Irving Hill, Presiding;
and
The United States District Court
for the District of Oregon
Hon. James A. Redden, Presiding.

Before: WRIGHT, KENNEDY, and BOOCHEVER,
Circuit Judges.

BOOCHEVER, Circuit Judge:

This opinion addresses the constitutionality of the retroactive application of the Multiemployer Pension Plan Amendments Act (the "Amendments Act"),¹ the subject of extensive nationwide litigation.² We hold that retroac-

¹Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified at 29 U.S.C. §§ 1001a *et seq.* (Supp. V 1981)).

²The following is a partial list of related cases: *Sibley, Lindsay & Curr, Co. v. Bakery, Confectionery & Tobacco Workers Int'l Union*, F. Supp. , No. Civ. 82-555T (W.D.N.Y. Mar. 16, 1983); *Washington Star Co. v. Int'l Typographical Union Neco. Pension Plan*, Civ. No. 82-1568 (D.D.C. Feb. 9, 1983) (mem.); *Bakersfield Concrete Constr. Inc. v. Construction Laborers Pension Trust*, No. 82-0044-WPG (C.D. Cal. Jan. 10, 1983); *Republic Indus. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, Civ. No. 82-0919-A (E.D. Va. Dec. 29, 1982) (mem.); *Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982); *Grano Steel Corp. v. Shopmen's Ironworkers Pension Plan*, No. CV 81-5862 LEW (C.D. Cal. Nov. 9, 1982); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 3 Empl. Ben Cas. 2129 (S.D.N.Y. 1982); *Pacific Iron & Metal Co. v. Western Conf. of Teamsters Pension Trust Fund*, No. C 82-653C (W.D. Wash. Oct. 15,

tive application of the withdrawal liability provision of the Amendments Act violates the due process rights of employers who withdrew from multiemployer pension plans before the Act became law.³

I. BACKGROUND

On September 26, 1980, the President signed into law the Amendments Act, amending certain provisions of the

1982); *Coronet Dodge v. Speckmann*, No. 81-724 C(3) (E.D. Mo. Sept. 30, 1982) (mem.); *Fur Mfg. Indus. Retirement Fund v. Lazar-Wisotzky, Inc.*, 550 F. Supp. 35 (S.D.N.Y. 1982); *Victor Constr. Co. v. Construction Laborers Pension Trust*, No. 81-5144-CHH (C.D. Cal. June 25, 1982); *Terson Co. v. Pension Benefit Guar. Corp.*, 3 Empl. Ben. Cas. 2372 (N.D.Ill. 1982), (dismissed as moot, unpublished order); *Peick v. Pension Benefit Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982); *S & M Paving, Inc. v. Construction Laborers Pension Trust*, 539 F. Supp. 867 (C.D. Cal. 1982).

³Several appeals are consolidated for disposition by this opinion. In nos. 82-5271 and 82-5272, the Pension Benefit Guaranty Corp. appeals the district court's denial of its motion to intervene in the suit brought by Shelter Framing Corp. and G & R Roofing Co. against Carpenters Pension Trust.

Nos. 82-5460 and 82-5461 are the appeals brought by Carpenters Pension Trust from the district court's grant of summary judgment in favor of plaintiffs Shelter Framing and G & R Roofing.

No. 82-5462 is the cross-appeal brought by G & R Roofing Co. challenging, *inter alia*, the district court's refusal to declare the Multiemployer Pension Plan Amendments Act unconstitutional as a taking of property without just compensation.

All of the above appeals are from the judgments of Hon. Irving Hill, C.D. California.

In No. 82-3506, R.A. Gray & Co. appeals from the grant of summary judgment by Hon. James A. Redden, D. Oregon, in favor of defendants Oregon-Washington Carpenters-Employers Pension Trust Fund and the Pension Benefit Guaranty Corp.

Employee Retirement Income Security Act ("ERISA").⁴ Under ERISA, the Pension Benefit Guaranty Corporation (the "Guaranty Corporation"), a government corporation, administers a system of termination insurance designed to protect employees whose pension plans fail or terminate with insufficient funds. The Guaranty Corporation receives no direct federal appropriations, but relies primarily on premium payments to meet its obligations to employees whose guaranteed benefits exceed the value of their plans' assets when the plans terminate. 29 U.S.C. § 1307 (Supp. V 1981).

When the Guaranty Corporation expended its own funds, it was formerly authorized by Title IV of ERISA to impose secondary liability on employers. Employers who withdrew from multiemployer plans incurred a contingent liability. If a plan terminated, all employers who contributed to that plan during the five years immediately preceding its termination were collectively liable to the Guaranty Corporation for the amount the Guaranty Corporation expended. If termination liability arose, however, no single employer's liability could exceed thirty percent of that employer's net worth. *Id.* at §§ 1362(b)(2), 1364 (1976).

The Guaranty Corporation advised Congress that the contingent liability provisions of ERISA gave employers an incentive to withdraw from multiemployer plans, particularly when their plans were in poor financial health. Congress responded by enacting the Amendments Act, which replaced contingent liability with absolute liability upon withdrawal. Under the Amendments Act, an employer who withdraws must immediately begin to pay a

⁴Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1381 (1976)).

fixed and certain debt owed to the pension plan. The withdrawal liability is the employer's proportionate share of the plan's unfunded vested liability, the difference between the present value of vested benefits and the value of the plan's assets. The withdrawal liability provision was assigned a retroactive effective date of April 29, 1980. *Id.* at § 1461(e)(2)(A) (Supp. V 1981).

II. FACTS

There are no disputed issues of material fact. A 1959 trust agreement between the United Brotherhood of Carpenters and Joiners of America ("the Union") and several multiemployer associations formed the Carpenters Pension Trust for Southern California, a multiemployer pension plan which primarily covers employees in the building and construction industry. The Trust assets are managed by a board of trustees. Half of the trustees are appointed by the Union; the other half are appointed by the multiemployer associations.

Shelter Framing Corporation is a licensed construction contractor in southern California. Prior to July 1, 1980, Shelter Framing was bound by a collective bargaining agreement with the Union. The agreement obligated Shelter Framing to contribute to the trust fund for each hour worked by covered carpentry employees.

That agreement terminated on July 1, 1980. Shelter Framing and the Union attempted to reach a new agreement but failed. When their negotiations reached an impasse, Shelter Framing was no longer required to make any contributions to the trust fund on behalf of its employees. It ceased making payments on August 12, 1980.

On April 24, 1981, the trustees notified Shelter Framing that it had withdrawn from the trust within the meaning of the Amendments Act, and Shelter Framing thus owed to the trust fund withdrawal liability of \$797,648.00. Shelter Framing had the option of paying the liability claim in a lump sum within 60 days, or in 40 monthly installments which, after interest, totalled \$899,751.88. Shelter Framing admitted it withdrew from the trust, but refused to make any payments on the liability claim. The joint statement of stipulated facts indicates that for the period ending March 31, 1981, the withdrawal liability equals about 180 percent of the total stockholder equity in the corporation.⁵

G & R Roofing Company is a construction contractor, obligated under a collective bargaining agreement to make contributions to the Carpenters Pension Trust for each hour of covered work performed by carpentry employees. The agreement expired July 1, 1980, and the parties failed to reach a new agreement. The last pension contribution G & R made to the trust fund was for work performed through August 12, 1980. On September 2, 1981, the trustees assessed withdrawal liability against G & R for \$687,387.00. G & R could pay a lump sum of that amount, or pay a total of \$784,824.88 in 45 monthly payments. The stipulated facts indicate that for the fiscal year ending September 30, 1981, the withdrawal liability equals about

⁵In its brief on appeal, Shelter Framing states that the withdrawal liability now exceeds twice the net worth of the corporation and that immediate payment of the total claim is financially impossible, as it would require the complete termination of operations and sale of the corporate assets.

forty percent of the total stockholder equity in the company.⁶

On August 28, 1981, Shelter Framing filed suit against the trust, seeking to enjoin the collection of withdrawal liability on constitutional grounds. G & R filed a similar complaint against the trust on October 27, 1981. The trustees answered and counterclaimed for collection of the assessed withdrawal liability in both cases, which were consolidated before Senior District Judge Irving Hill.

On October 2, 1981, the trust's co-counsel informed the appellant Guaranty Corporation of the pending suit. The Guaranty Corporation is authorized to intervene in civil actions brought under the withdrawal liability provisions of ERISA. 29 U.S.C. § 1451(g) (Supp. V 1981). The Guaranty Corporation declined the trustees' invitation to intervene, though it said it would monitor the case. G & R sent a Notice of Service of Complaint in its action to the Guaranty Corporation on October 30, 1981.

In November, G & R and Shelter Framing filed motions for preliminary injunctions against attempts by the trustees to collect the withdrawal liability. The Guaranty Corporation learned from a G & R attorney in early November that the motions would be heard on December 7, 1981. The motion hearing was continued until January 11, 1982.

Judge Hill granted the plaintiffs' motions to enjoin further efforts by the trustees to collect withdrawal liability. On January 14, 1982, at a hearing held to set the terms of

⁶In its brief on appeal, G & R reiterates that if paid in a lump sum, the withdrawal liability totals forty percent of the company's net worth. If paid on a monthly basis, the annual liability would represent ninety-four percent of G & R's net income for its fiscal year 1981.

the preliminary injunctions, Judge Hill said he would enjoin the parties from arbitrating the disputed amount of withdrawal liability. The order was entered on January 20, 1982. The parties then filed cross-motions for summary judgment, accompanied by a joint statement of stipulated facts.

The Guaranty Corporation moved to intervene in the case on February 22, 1982. It sought to dissolve the injunction against arbitration between the employers and the trustees. The district court held that the Guaranty Corporation could not move for partial dissolution of the preliminary injunctions unless and until it was a party to each action, but agreed to hear the question of exhaustion of arbitration on March 22, 1982, before the hearing on the motions for summary judgment. The court denied the Guaranty Corporation's motion to intervene as untimely, and stated the parties would be prejudiced if the Guaranty Corporation were given leave to intervene. It did allow the Guaranty Corporation to participate as *amicus curiae*.

After hearing arguments, Judge Hill held that exhaustion of the administrative remedy of arbitration was not required before proceeding to the merits of the constitutional challenges, because the arbitrators could not adjudicate or develop a better record for adjudication of the constitutional claims. On cross-motions for summary judgment, the court held that the Amendments Act was unconstitutional as applied to Shelter Framing and G & R. Judgments were entered in favor of plaintiffs on April 13, 1982. The court also awarded attorney's fees to plaintiffs.⁷

⁷Judge Hill's opinion is reported at 543 F. Supp. 1234 (C.D. Cal. 1982).

After entry of judgment, the parties entered into a stipulation to allow the Guaranty Corporation to intervene for purposes of appeal. The Guaranty Corporation chose not to intervene, and the court denied the intervention on the ground that it lacked jurisdiction to reverse by stipulation its prior order denying intervention. The Guaranty Corporation appeals the district court's prior denial of the motion to intervene at trial and also seeks to appeal the court's failure to require arbitration before ruling on the constitutional claims.

R.A. Gray & Co. is an employer who was obligated under a collective bargaining agreement with the Oregon State Council of Carpenters to contribute to the Oregon-Washington Carpenters-Employers Pension Trust Fund. The parties did not renew the agreement when it expired on May 31, 1980. On July 24, 1981, the trustees notified R.A. Gray that it had withdrawn from the multiemployer plan as of June 1, 1980 and assessed withdrawal liability in the amount of \$201,359.00.

R.A. Gray sued for declaratory and injunctive relief in September 1981, challenging the constitutionality of the Amendments Act on grounds similar to those considered in Judge Hill's court. Judge Redden denied R.A. Gray's request for a preliminary injunction, and granted summary judgment for the trust.

III. THRESHOLD ISSUES

Before we reach the issue of the constitutionality of the retroactive application of the Amendments Act, we must consider two threshold issues raised by the Guaranty Corporation in appeal numbers 82-5271 and 82-5272. The first is whether the district court abused its discretion in deny-

ing the Guaranty Corporation's motion to intervene. The second is whether parties challenging the constitutionality of the Amendments Act must exhaust the administrative remedy of arbitration before adjudication of the constitutional claims.

A. INTERVENTION

Federal Rule of Civil Procedure 24(a) allows intervention as of right upon timely application when a federal statute confers an unconditional right to intervene, or when the applicant claims an interest relating to the subject of the action and disposition may impair or impede its ability to protect that interest. A district court's ruling that an intervention motion is untimely will not be overturned unless the court abused its discretion. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1009 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

The district court did not abuse its discretion in denying the Guaranty Corporation's motion. The court stated that the motion was untimely and that the Guaranty Corporation had forfeited its right of intervention by permitting the matter to progress as far as it had without attempting to intervene.

We weigh three factors to determine timeliness: the stage of the proceedings at which an applicant seeks to intervene, the reason for and length of the delay, and whether the parties would suffer prejudice. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), cert. denied, 439 U.S. 837 (1978). Our focus is on the date the Guaranty Corporation should have been aware its interest would not be protected adequately by the parties, not the date it learned of the litigation. See *id.*; *Legal Aid Society*

of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980) (per curiam).

The Guaranty Corporation argues that it does not have the staff to intervene in all actions challenging the constitutionality of the Amendments Act (now over 100 nationwide) and must monitor cases until it decides intervention is required to protect its interests. In the cases here on appeal, it claims that it was not aware until mid- to late January that the Carpenters Pension Trust would not take the position favored by the Guaranty Corporation, requiring arbitration as an administrative remedy before adjudication of the constitutional claims. It "suspected" that its interests might not adequately be represented on January 15, 1982, when it learned that the trust's counsel did not oppose an injunction against arbitration. The suspicion "turned to alarm" when the Guaranty Corporation received a copy of the court's injunction on January 25, 1982.

We are not convinced by the Guaranty Corporation's claim that it did not suspect that the trust would not protect the Guaranty Corporation's interests until late January. The Guaranty Corporation knew in early November that preliminary injunction motions had been filed. It never inquired what position the trust or other parties would take on the arbitration issue. The trust never indicated to the Guaranty Corporation it would ask for arbitration; in fact, the trust's counsel stated "no one could have had a reasonable basis for assuming" that the trust would seek arbitration.

In *Alaniz*, appellants sought intervention seventeen days after a consent decree became effective. They argued that they did not know the settlement decree would be to their detriment. The court affirmed denial of their motion,

stating "surely they knew the risks. To protect their interests, appellants should have joined the negotiations before the suit was settled." 572 F.2d at 659. The Guaranty Corporation even more clearly knew the risks in these cases. Had it monitored the cases, as it told the trust it would, it could not reasonably have assumed that the trust would demand arbitration.

Even if the Guaranty Corporation is not held to have known the risks, and did not learn its interests were jeopardized until January 15, it still fails the timeliness test. It did not move to intervene until February 22, more than one month after its original "suspicion" arose. See *NAACP v. New York*, 413 U.S. 345, 367 (1973) (delay of two and one-half weeks was untimely where motion papers indicated a strong likelihood that the parties would enter into a consent decree). Since prompt adjudication of the employers' claims was in the litigants' interest, they would be prejudiced by permitting this inexcusably late intervention motion.

Finally, the district court allowed the Guaranty Corporation to argue as *amicus curiae* on the issue of arbitration, thus the Guaranty Corporation had fair opportunity to present its views to the court. In view of that opportunity, and the Guaranty Corporation's untimely action, we hold that the district court did not abuse its discretion.

B. ARBITRATION

The Guaranty Corporation argues that the district court lacked jurisdiction and, in any event, should not have addressed the constitutional issues before requiring arbitration because arbitration of withdrawal liability is statutorily mandated and, if not mandatory, should be required as

a matter of policy. In view of our decision that the district court did not err in denying the Guaranty Corporation's motion to intervene, the Corporation has no standing to raise the arbitration issue. Nevertheless, we must reach that issue at least to determine whether arbitration of withdrawal liability was mandated, before the district court could address the constitutionality of the withdrawal provisions.

Section 4221(a)(1) of ERISA does provide for resolution of disputes through arbitration proceedings. 29 U.S.C. § 1401(a)(1) (Supp. V 1981). The statute is limited, however, to those disputes involving a determination made under section 4201 through 4219 of ERISA. Those sections refer to the establishment, computation and collection of withdrawal liability. 29 U.S.C. at §§ 1381-1399 (Supp. V 1981). Thus the arbitration requirement does not apply where the constitutionality of the statute, not the establishment or amount of withdrawal liability, is at issue. The district court correctly found no mandatory arbitration requirement for determination of constitutional issues.

Where there is no statutory requirement of exhaustion, the court should balance the agency's interests in applying its expertise, making a proper record, and maintaining an efficient, independent administrative system with the interests of private parties in finding adequate redress. *Montgomery v. Rumsfield*, 572 F.2d 250, 253 (9th Cir. 1978). We recognize the importance of the exhaustion doctrine and its underlying policy of judicial efficiency. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Upon weighing the relevant factors, however, we conclude that arbitration in this case would be of no value to the parties or the court. The Guaranty Corporation's

expertise relates only to how the Amendments Act is to be applied and administered; it cannot aid the court in addressing the naked constitutional law issue raised by the employers in their direct attack upon the entire statutory scheme. Arbitration would not eliminate the assessed withdrawal liability. There is only a remote possibility that liability would be reduced materially. Arbitration would neither develop a better record for adjudication of the constitutional issues nor eliminate the need to consider the constitutional challenge.

Our conclusion is consistent with the decisions of other courts that have already considered the adequacy of arbitration as an administrative remedy in the face of a constitutional attack on the Amendments Act. *See Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982) (it would be futile to compel exhaustion where plaintiff mounted a facial challenge to the Amendments Act); *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1038 & n.27 (N.D. Ill. 1982) (where plaintiffs brought a facial challenge to the statute, the lack of a factual record and the possibility of an exemption did not bar action on ripeness grounds).⁸

IV. RETROACTIVITY

Having concluded that the district court had jurisdiction to consider the constitutional challenge to the Amendments Act, we now turn to the issue of whether retroactive

⁸We agree with the court in *Republic* that where the exhaustion doctrine is inapplicable, we need not consider the trust's argument that this case falls within one of the exceptions to the exhaustion doctrine. 693 F.2d at 298.

application of the Act violates due process. We have reviewed opinions on both sides of the issue.⁹ We recognize that the Amendments Act comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). We also recognize that "[t]he due process clause does not make unconstitutional every law with retroactive effect" and that "[o]nly when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded." *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated on other grounds*, 430 U.S. 952 (1977). We find, however, that the retroactive burden imposed by the Act on plaintiffs-employers is constitutionally invalid.

An analysis of the retroactivity issue must begin with a review of congressional goals in enacting the Amendments Act and a brief legislative history of the Act.¹⁰ As enacted in 1974, ERISA provided that before January 1, 1978, payment of guaranteed benefits earned by employees in multiemployer plans was made at the discretion of the Guaranty Corporation. 29 U.S.C. § 1381(c) (1976). On

⁹In addition to the well-reasoned opinions of Judges Hill and Redden, a thorough discussion of the issue may be found in *Peick v. Pension Benefit Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982). Judge Getzendanner concludes in *Peick* that although "this is an extremely close call", *id.* at 1056, retroactive application of the amendments Act is constitutional. *But see Sibley, Lindsay & Curr, Co. v. Bakery, Confectionery and Tobacco Workers Int'l Union*, F. Supp. No. Civ. 82-555T (W.D.N.Y. Mar. 16, 1983), in which the court held that retroactive application of the Act is unconstitutional.

¹⁰For an extensive discussion of the legislative history of the Amendments Act, see *Peick*, 539 F.2d at 1029-34.

January 1, 1978, payment of guaranteed benefits for terminated multiemployer plans was to become mandatory. In 1977, Congress expressed concern about the effect, particularly the cost, of implementing the mandatory guarantee. It therefore delayed the effective date of the mandatory guarantee program and ordered the Guaranty Corporation to submit a report on multiemployer plans. See *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1030-31 (N.D. Ill. 1982). Over the course of the next few years, while Congress debated the issue of multiemployer plan termination, the effective date of the mandatory guarantee program was extended three more times in anticipation of legislative changes in ERISA's multiemployer plan provisions. *Id.* at 1032-33.

The Guaranty Corporation's study, submitted to Congress on July 1, 1978, reported that ERISA might encourage termination of multiemployer pension plans. The Corporation suggested that since mandatory termination insurance would protect virtually all vested benefits in multiemployer plans, employers, whose liability was contingent and limited to thirty percent of their net worth, might choose to terminate their plans. Active employees might also desire termination where a high proportion of pension contributions was being used for retirees' benefits. The Guaranty Corporation feared that these combined economic advantages might act as an incentive to plan termination. *Id.* at 1031-32 (quoting Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 23-24 (1978)). On February 27, 1979, the Corporation submitted a legislative proposal advocating certain changes in ERISA designed to diminish that incentive. Legislation was formally introduced on May 3, 1979.

The 1979 legislative proposal eventually became the Amendments Act. When the bill was first introduced, the withdrawal liability rules were given an effective date of February 27, 1979, the date the proposal was first submitted by the Guaranty Corporation. In June 1980, the Senate Finance Committee determined that the February 27, 1979 date was unnecessarily harsh, and changed it to April 29, 1980, the date eventually enacted into law. *Id.* at 1053. The Act was finally signed into law on September 26, 1980.

In determining the validity of the retroactive provision, Judge Hill and Judge Redden followed the analysis used by the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). The issue presented in *Nachman* was whether the retrospective imposition of employer liability authorized by ERISA superseded a liability exclusion clause included in the single employer's pension plan. The court examined four factors for the purpose of determining whether the employer was subject to liability. The factors were: (1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. Applying that test the *Nachman* court held that the employer was liable. Although the case did not involve a retroactive effective date, we agree that the *Nachman* test applies here, and we shall discuss each of the factors as applied to the retroactive imposition of the withdrawal liability required by the Amendments Act.

A. RELIANCE INTERESTS

This factor weighs in favor of Shelter Framing, G & R, and R.A. Gray ("the employers"). They all withdrew from their multiemployer plans before the date the Amendments Act was enacted. It was not certain at the time they withdrew that the Amendments Act would be enacted and would have a retroactive effect. We reject the argument that the employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. *See Peick*, 539 F. Supp. at 1053. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the Amendments Act to pass. It would have been impossible for anyone to predict with accuracy the final outcome of the legislative process. The employers therefore relied reasonably upon their collective bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA.

The law here operates to the severe detriment of the employers, and we believe their reliance on the prior law to be the most relevant reliance interest to be considered. Yet we recognize as well that *Nachman* suggests consideration should be given to the reliance interests of other parties.

Employees expecting benefits under their multiemployer plans have an interest in the financial health of their plans. Their interest, however, goes more toward the solvency of the multiemployer plan as a whole than toward the individual contributions of a single employer, and this does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability. There is no

reason to believe that employee significantly relied for the financial health of the multiemployer plans on the increased termination liability imposed by the Amendments Act on those employers who withdrew between the effective date of the Act and the date of enactment. For example, the withdrawal liability imposed on the employers here is relatively insignificant in terms of the plans' total unfunded vested benefits liability. Judge Hill found that the employers' failure to pay their withdrawal liability caused Carpenters Pension Trust no clear or immediate harm. The trust fund and covered employees have not relied heavily on these employers' contributions, and thus their interests do not outweigh the reliance interests of the employers.

The *Nachman* court put greater emphasis on employee interest, but that case is different. *Nachman* involved a single employer pension plan, thus the employees had a far greater interest in the contributions of one employer. Furthermore, the employer in *Nachman* terminated after the enactment of ERISA. The employers in these cases, having withdrawn before enactment of the Amendments Act, were not given the opportunity to make such an educated choice. There were alternative actions the employers might have taken to avoid withdrawal liability had they known about their exposure to withdrawal liability under the Amendments Act. For example, they might have renewed their collective bargaining agreements and continued to contribute to the plans. They might have gone out of business completely, or sold their assets to a company which participated in the plan. We conclude that the reliance factor weighs against the retroactive application of the statute.

B. PRIOR REGULATION

This second factor, whether the interests impaired by the retroactive application of the Act were previously subject to regulation, is another facet of reliance. Where parties engage in a regulated business, they should reasonably anticipate some modification of the scope of regulation. In *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32 (1940), the Supreme Court emphasized the importance of prior state regulation in upholding a New Jersey law which was more restrictive than its predecessor. The plaintiff purchased shares in a savings and loan when state law allowed for a later turnback or redemption of those shares. After his purchase, the law was changed to restrict the conditions of redemption. The funds from which defendant was allowed to redeem shares were defined more narrowly, and early redeemers were given less priority on their turned-back shares. The Court stated:

It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.

Veix, 310 U.S. at 38 (footnote omitted).

Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974. Subjecting parties to some risk of further regulation should not, however, require them to anticipate drastic legislative changes which extract a heavy fine for action taken before the changes win congressional approval. Parties can reasonably be expected to adjust their behavior in accordance with legislation which clarifies or modifies existing restrictions. In *Federal Housing Administration v. The*

Darlington, Inc., 358 U.S. 84 (1958), the Supreme Court upheld an amendment to regulations regarding rental of property financed by federally insured loans. The Court said that in amending the law, Congress was articulating a construction of the law which it had already accepted under the original language. Thus the amendment was a clarification of, not a drastic change in, the existing law. In contrast, the retroactive application of the Amendments Act goes far beyond a clarification or modest modification of ERISA. The Act imposes a much heavier burden on withdrawing employers than had been imposed by ERISA. The fact of prior regulation in the pension plan area weighs in favor of retroactive application, but does not away us from our conclusion that such application of the Act impaired the employers' reliance interests to an unduly harsh degree.

C. EQUITIES

Here we confront the difficult task of weighing the individual burdens on the withdrawing employers against the policies Congress hoped to further by establishing a retroactive effective date for the Amendments Act. We approach our task sensitive to the historical development of judicial review of economic legislation.

The Supreme Court expressed its disfavor of retrospective legislation in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). At issue in *Alton* was a federal law requiring the railroads to establish a pension fund which would cover current employees and those who had worked for the railroad within the year before the law was adopted. The law also provided certain benefits to employees who left the railroad service and later returned. The Court held that the statute violated the due process

clause, because it arbitrarily imposed additional liabilities on employers for transactions long ago closed and fully compensated. 295 U.S. at 353-54.

The reluctance of the Court in *Alton* to defer to legislative judgment is generally associated with the era of the Court's vigorous protection of economic interests on constitutional grounds. The decision, however, has never expressly been overruled. It was narrowed by the Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, Congress passed a law providing benefits to coal mine workers who suffered from black lung disease. Amendments to the statute increased miners' benefits, which were paid in part by coal mine operators. The operators challenged the retrospective effect of the statute, arguing that it violated their due process rights because it required the operators to pay benefits to miners who had left their employ before the effective date of the act. The Court held the act valid as a rational means by which to spread the costs of mine workers' disabilities.¹¹

Turner Elkhorn Mining suggested that the Supreme Court favors great deference to Congress' judgment in allocating economic benefits and burdens, even where legislative schemes impose significant hardships on some individuals. The more recent case of *Allied Structural*

¹¹A similar result was reached by this court in *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 859 (9th Cir. 1979). There the court held that a provision of the Longshoremen's and Harbor Workers' Compensation Act which allows for payment of death benefits if an employee who sustains permanent total disability due to injury thereafter dies from causes other than the injury applies to claims based upon a death which occurred after the effective date of the statute, even though the injury occurred before the effective date. The court rejected the argument that the statute violated due process, finding that the survivors' rights in death benefits first vested upon the employees' death, after the effective date of the statute. *Id.* at 902.

Steel Co. v. Spannaus, 438 U.S. 234 (1978), restricts the degree of that deference. *Allied Structural Steel* involved a Minnesota law which provided protection to employees covered under private pension plans. Under plaintiff-employer's plan, certain employees did not have vested rights until they had worked fifteen years for the employer. Under the statute, employees needed only ten years of service to qualify as pension obligees. The Court held that the statute violated the contract clause because, *inter alia*, the law "worked a severe, permanent, and immediate change" in the contractual relationships, it worked unfairly against those who voluntarily had established pension plans, and it regulated a field not previously regulated by the state. 438 U.S. at 250.¹²

This case shares with *Alton* and *Allied Structural Steel* a harsh burden imposed upon the employers for completed transactions. The effective date of the Act was arbitrarily fixed. The employers are required now, after making the measured decision to withdraw from their plans, to pay a sum that seriously threatens their solvency, without a specific showing of proportionate need on the part of the pension trust funds.

¹²The Supreme Court has not expressly stated that the contract and due process clauses impose identical restraints on the legislative impairment of contracts. Considerations similar to those examined in contract clause analysis, however, may apply to the federal government through the due process clause. We have in the past confirmed the concurrent scope of the protection afforded by these provisions:

[T]he Fifth Amendment's due process clause provides essentially the same restraint against federal impairment of the obligation of contracts [as the contract clause].

Northwestern Nat'l. Life Ins. Co. v. Tahoe Regional Planning Agency, 632 F.2d 104, 106 (9th Cir. 1980); see also *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 904 (9th Cir. 1979) (Sneed, J., concurring).

This burden on the employers lacks the justification present in *Turner Elkhorn Mining*. There the Supreme Court found

that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers.

Turner Elkhorn Mining, 428 U.S. at 18. In contrast, here there were no hidden risks, such as those of black lung disease, constituting a rational basis to alter drastically the expected economic balance.

In distinguishing *Allied Structural Steel* from the facts in *Nachman*, the Seventh Circuit emphasized that Title IV of ERISA "represent[s] a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose." 592 F.2d at 962. The same cannot be said of the retroactive application of the Amendments Act. The withdrawal liability imposed on the employers for their pre-Amendments Act termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans. Those withdrawing prior to enactment of the Amendments Act were still contingently liable under ERISA. Additionally, employers could have been required to post a bond upon their withdrawal, or the withdrawal liability provisions of ERISA, while still contingent, could have been modified to provide a more secure "safety net" in the event a particular pension plan failed. Keeping in mind that we refer only to those employers who withdrew in the brief period between April

29, 1980 and September 26, 1980, and balancing the benefits to the multiemployer plans of imposing liability over and above the contingent liability already lawfully imposed by ERISA against the burden on the employers, we conclude that the equities weigh against retroactive application of the Amendments Act.

D. MODERATING PROVISIONS

The absence of moderating provisions in the Amendments Act as applied retroactively is the most significant distinction between this case and *Nachman*, 592 F.2d at 962-63. The Amendments Act does not contain three major moderating provisions of ERISA: the contingent nature of the liability, the cap on payments placed at thirty percent of an employer's net worth, and the calculation of liability based on only the amount guaranteed by the Guaranty Corporation, not the full value of the employees' vested benefits. The Amendments Act nevertheless offers several mitigating provisions of its own. A mandatory "de minimis" exemption excuses in general all assessments under \$50,000.00. 29 U.S.C. § 1389(a) (Supp. V 1981). A higher exemption is available if the trustees opt for it in their discretion. *Id.* at § 1389(b) (Supp. V 1981). Withdrawal liability is payable over time according to a schedule prescribed by statute. *Id.* at § 1399(c)(1) (Supp. V 1981). Liability is limited to the first twenty annual payments if more than twenty years are needed to amortize an employer's withdrawal liability. *Id.* at § 1399(c)(1)(B) (Supp. V 1981). Liability is reduced if the employer withdraws because it has liquidated or dissolved its business. *Id.* at § 1405 (Supp. V 1981).

We find little, if any, comfort for the employers in these provisions. The de minimis exemption may well be inap-

plicable, as it is here, and the further exemption can only be exercised by the trustees. The employers could not with certainty predict the form and passage of the Act, thus they could not choose to go out of business, or sell to a buyer in the industry. The twenty-year restriction, which does little to mitigate a large withdrawal liability, is inapplicable. The assessment of liability in monthly installments, as opposed to a lump sum payment, fails to mitigate the burden where the monthly payments would take an unreasonable amount of the employers' income. Finally, it is not clear, as Carpenters Pension Trust claims, that if the employers rejoin the plan, their liability would be abated or eliminated. Even assuming that the employers could rejoin their plans, pursuant to new collective bargaining agreements, the Guaranty Corporation has not yet adopted regulations regarding the possible reduction or waiver of liability where a former participant rejoins a plan.

We hold that retroactive application of the Amendments Act violated the employers' rights to due process as guaranteed by the fifth amendment. We take special care to note that our holding applies only to those employers who withdrew before the enactment of the Amendments Act, but after the effective date of the Act. We express no opinion as to the constitutionality of the imposition of liability on employers who withdrew after September 26, 1980.

Since we find that the retroactive application of the Act is constitutionally invalid, we need not reach the issue of whether the imposition of liability constitutes a taking for which compensation is required, or any of the other numerous issues raised by the parties other than the award of attorney's fees.

V. ATTORNEY'S FEES

The district court in *Shelter Framing* and related cases awarded attorney's fees under 29 U.S.C. § 1451(e) (Supp. V 1981).¹³ The Act provides for award of fees to a party "who is adversely affected by the act or omission" of another party with respect to a multiemployer plan. The trust contends that it did nothing other than carry out the obligations imposed by the Amendments Act, thus it did not act or omit to act under its construction of the statute. The statute, however, contains no language which would restrict the terms "act or omission of any party" to conduct which is in violation of the provisions of the statute. We therefore hold that the language of the statute is broad enough to include an award for vindication of constitutional rights. The act of imposing substantial withdrawal liability upon the employers adversely affected them. Since *Shelter Framing* and *G & R* were clearly the "prevailing parties", they were entitled to attorney's fees in the discretion of the district court. See *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452-53 (9th Cir. 1980). We

¹³The relevant sections read in pertinent part:

(a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(Supp. V 1981).

(e) Costs and expenses. In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

29 U.S.C. § 1451(e) (Supp. V 1981).

find no abuse of discretion and affirm the award. We also grant attorney's fees on appeal under 29 U.S.C. § 1451(e) to Shelter Framing and G & R, who requested such fees.¹⁴

The judgments in appeal numbers 82-5271, 82-5272, 82-5460 and 82-5461 are AFFIRMED. Our affirmance in appeal number 82-5461 disposes of the issues raised in cross-appeal number 82-5462, and we do not reach the contentions therein. The judgment in appeal number 82-3506 is REVERSED.¹⁵

¹⁴Appellant R.A. Gray made no request for attorney's fees on appeal. See 9th Cir. R. 13(b)(1)(E).

¹⁵Attorneys for G & R moved this court for sanctions against the Guaranty Corporation for alleged violation of Fed. R. App. P. 28(j) and 9th Cir. R. 13(g). We find no impropriety and deny the motion.

**Attorneys for Defendant
Oregon-Washington Carpenters-
Employers Pension Trust Fund**

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OFFICE OF GENERAL COUNSEL

Henry Rose, General Counsel
Baruch A. Fellner, Associate General Counsel
J. Stephen Caffisch, Special Counsel
David F. Power, Attorney
Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant
Pension Benefit Guaranty Corporation.

REDDEN, JUDGE:

Plaintiff R.A. Gray & Co. (Gray) brought this action to obtain a declaration that certain provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (September 26, 1980), 29 U.S.C.A. § 1001, *et seq.* (Supp. 1981) are unconstitutional and unenforceable. Gray contends that those provisions of the MPPAA which create withdrawal liability are unconstitutional as applied to employers who withdrew from a multiemployer pension plan prior to the date of the enactment of the MPPAA. Gray also attacks the arbitration provisions of the MPPAA. Gray moves for summary judgment. The defendants, the Oregon Washington Carpenters-Employers Pension Plan Trust Fund (Trust) and the Pension Benefit Guaranty Corporation (PBGC), contend that the MPPAA is valid and enforceable and they move for summary judgment in their favor. I conclude the statute is valid. I grant defendants' motions for summary judgment and deny Gray's.

PARTIES

The Trust is administered pursuant to the Revised Pension Plan for the Oregon Washington Carpenters-Employers Pension Trust Fund (Plan). The Plan is a multiemployer defined benefit pension plan within the meaning of the Employment Retirement Income Security Act of 1974 (ERISA), *as amended by* the MPPAA, 29 U.S.C.A. § 1301(a)(3) (Supp. 1981). The Plan is a building and construction plan within the meaning of ERISA, 29 U.S.C.A. § 1383(b). The Plan is administered by the Board of Trustees (Trustees).

Gray is an employer within the meaning of Title IV of ERISA. Pursuant to successive collective bargaining agreements with the Oregon State Counsel of Carpenters (Union), Gray made contributions to the Trust to finance the pension benefits provided by the Plan.

The PBGC is a United States Corporation which was created by ERISA. It is responsible for administration and enforcement of ERISA, as amended by the MPPAA, 29 U.S.C.A. §§ 1301-1461, 1303(e)(1) (Supp. 1981).

EVENTS

In February 1980 Gray notified the Union that Gray was terminating its collective bargaining agreement with the Union. In July 1981, the Trustees notified Gray that Gray had completely withdrawn from the Plan as of June 1, 1980 and had a withdrawal liability in the amount of \$201,359. The Trustees demanded payment of the withdrawal liability in accordance with a specified quarterly schedule. Gray filed this action on September 29, 1981. Gray also moved for a preliminary injunction to restrain the Trust from taking further steps to collect the withdrawal liability. I denied the motion.

In response to Gray's request that the Trustees review their determinations with regard to Gray's withdrawal liability, the Trustees issued a "Decision on Review." The Decision on Review made several findings that the Trustees had previously accurately determined: (1) the method for allocating the unfunded vested benefits to Gray, (2) the amount of the Plan's unfunded vested benefits, (3) the schedule of payments offered to Gray, and (4) the date of Gray's complete withdrawal.

Following receipt of the Decision on Review, Gray could have initiated arbitration of disputes with the Trustees. Gray however, informed the court on February 16, 1982 that it accepted and adopted the Trustees' findings and further stated that it waived the right to arbitration under the MPPAA.

None of the parties disputes the foregoing facts.

BACKGROUND

On September 26, 1980, the MPPAA was signed into law. The MPPAA changed the law governing an employer's withdrawal from pensions plans. Under the MPPAA, withdrawal from a multiemployer plan gives rise to a fixed debt owed to the pension plan. The withdrawing employer becomes liable for a proportionate share of the pension plan's unfunded vested liability. The trustees of the pension plan have the duty to calculate and collect the liability. Disputes between an employer and the trustees over the amount or method of assessment go first to arbitration. Although the MPPAA became law on September 26, 1980, the MPPAA expressly provides that the provisions governing withdrawal liability are retroactively applied to withdrawals occurring on or after April 29, 1980. Therefore, an employer withdrawing before September

26, 1980 but after April 29, 1980 is bound by the withdrawal liability provisions of the MPPAA.

GRAY'S CONTENTIONS

Gray contends that the retroactivity of the MPPAA withdrawal provisions is arbitrary, irrational and violates the due process clause of the fifth amendment to the United States Constitution as well as Gray's "rights arising out of contract." Gray also contends that the MPPAA violates the equal protection clause of the fifth amendment to the United States Constitution by irrationally distinguishing between employers who contribute to single-employer plans and those who contribute to multiemployer plans and discriminating against the latter. Gray contends that the MPPAA also violates Article I, Section 9, Clause 3 of the United States Constitution which prohibits the enactment of *ex post facto* laws. Finally, Gray contends that the "compulsory arbitration" provisions of the MPPAA impermissibly curtail the seventh amendment right to a jury trial and violate due process.

The defendants do not dispute Gray's contention that the statute is retroactive.

DUE PROCESS AND RETROACTIVITY

The Plaintiff's burden on this issue is set out in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

428 U.S. at 15.

In *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980) (*Nachman*), the Seventh Circuit held that the retroactive application of Title IV of ERISA did not violate due process. *Nachman* surveyed the precedents and synthesized them in a four-factor analysis of the burden imposed by the challenged legislation. 592 F.2d at 958-60. The four factors are: (1) the reliance interest of the affected parties, (2) whether the interest impaired is in an area previously subjected to regulatory control, (3) the equities of the legislative burdens, and (4) statutory provisions which limit and moderate the impact of the burdens imposed. *Id.* at 960. The four factors described the burden imposed. In evaluating the statute, the court compares the problem being remedied with the burdens imposed to determine if the legislative remedy is irrational and therefore violates due process. *See Id.*

The parties point to three decisions on the issue which is before me. Plaintiffs point to the two decisions of Judge Hill in *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, Civil No. 81-4457-IH (D.C. Cal. 1982), and *G & R Roofing Co. v. Carpenters Pension Trust for Southern California*, Civil No. 81-5551-IH (D.C. Cal. 1982), in which he held that the retroactive application of the withdrawal provisions was impermissible. Defendant PBGC points to the decision of Judge Getzendanner in *Peick v. PBGC*, Civil No. 81 c 1911 (N.D. Ill. May 14, 1982), in which she ruled that the retroactive provision of the MPPAA survives a facial attack on due process, equal protection, seventh amendment and contractual impairment grounds.

Both the decisions of Judges Hill and Getzendanner and

the briefs of the parties use the four factor analysis of *Nachman*. I agree that it is the appropriate approach.

A. Problem to be Remedied

As originally enacted in 1974, ERISA provided that before January 1, 1978, payment of guaranteed benefits for terminated multiemployer plans was discretionary, and on January 1, 1978, payment of guaranteed benefits for such plans was to become mandatory. 29 U.S.C. § 1831(c). In 1977 Congress became concerned about the effect of implementing the mandatory guarantees, delayed the date for implementation and ordered the PBGC to submit a report on multiemployer plans. *Peick v. PBGC* at 5-6.

The PBGC report, entitled "Pension Benefit Guaranty Corporation, Multiemployer Study, Required by P.L. 95-214," was submitted on July 1, 1978. It contained the following findings, which I take, as quoted, from *Peick v. PBGC* at 6:

1. There were about two thousand covered multiemployer pension plans with approximately eight million participants. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 1, 20 (1978) (hereafter cited as PBGC Report).

2. About ten per cent of these plans were experiencing financial difficulties that could result in plan termination before 1988. These plans had about 1.3 million participants. *Id.* at 1, 138.

3. If all of these plans were to terminate, it could cost the insurance system about \$4.8 billion to fund all plan benefits then covered by Title IV's guarantee. The annual premium

needed to fund this liability would be unacceptably high. *Id.* at 2, 16, 139.

4. Limiting consideration to only those covered multiemployer pension plans which were experiencing sufficiently serious financial difficulties that it was likely they would become insolvent before 1988, the cost to the insurance system to fund all guaranteed plan benefits could be approximately \$560 million. The annual per capita premium needed to fund this liability could rise from fifty cents to as much as nine dollars. *Id.* at 2, 16, 140.

The PBGC report also found that ERISA and particularly Title IV of ERISA, might encourage termination of multiemployer pension plans. PBGC Report at 23-4.

The House Education and Labor Committee concurred in the views of the PBGC:

[T]he corporation's report clearly demonstrates that: (1) the magnitude of the risk and the potential exposure of the system are intolerably high; and (2) existing law and particularly the plan termination insurance provisions are inadequate to assure financially sound multiemployer plans, may accelerate declines and further weaken and hasten the termination of financially weak plans. The committee agrees with the conclusions of the corporation that there are serious defects in current law which undermine the benefit security of multiemployer plan participants.

H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 57, *reprinted in* (1980) Code Cong. & Ad. News 2925. The Committee also stated that it considered the MPPAA necessary, because failure to act "would create economic havoc and do serious harm to active workers and retirees

in, and employers contributing to, multiemployer plans.”
Id., H.R. Rep. at 63, Code Cong. at 2931-2.

On April 30, 1980, Congress delayed, for the third time, implementation of the mandatory guarantees. In April 1980, the House approved the MPPAA and in July 1980, the Senate did the same. In September 1980, the differences in the two versions were reconciled. *Peick v. PBGC* at 10-11.

29 U.S.C.A. § 1001a (supp. 1981) sets forth the Congressional Findings and Declarations of Policy for the MPPAA:

(a) The Congress finds that

....

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and [that]

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation and contain program costs within reasonable limits.

In summary, imposition of withdrawal liability was intended to remove existing statutory incentives for employers to withdraw from troubled or potentially troubled plans, while providing that newly entering employers would not be saddled with obligations incurred prior to their entry into the plan. The withdrawal liability also was intended to insure that a withdrawing employer would fund a share of the obligations incurred during that employer's association with the plan.

B. Means of Remediating the Problem: The Burden

1. The Reliance Interest of the Affected Parties

Gray argues that prior to the enactment of the MPPAA, its sole perceived responsibility was "payment of a defined contribution to a jointly trustee plan, the success of which did not depend on the employer." However, Section 10.03 of the Plan from which Gray withdrew does contemplate the possibility of change through ERISA:

Except for liabilities which may result from provisions of ERISA, nothing contained in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement. (Emphasis added).

Triplett Affidavit at 105. The Plan itself recognized that

the employers' obligations were subject to statutory modification.

When the bill containing the MPPAA was originally introduced on May 3, 1979, the bill retroactively applied to withdrawals on or after February 27, 1979. *Peick v. PBGC* at 67. February 27, 1979 remained the effective date for withdrawal liability until June 1980, when the Senate Finance Committee decided that the February 27, 1979 date was unnecessarily harsh and advanced the date to April 29, 1980. *Id.*

By April 29, 1980, the date which Gray attacks, the MPPAA had already received approval by the House Education and Labor Committee, the House Ways and Means Committee and the Senate Labor and Human Resources Committee. *Id.* Each approved version applied retroactively to withdrawals on or after February 27, 1979. *Id.* at 67-68. The pre-enactment circumstances therefore provided employers with some notice that they could not rely on the contribution obligation of their collective bargaining agreements. Judge Getzendanner relied on this history to reason that fair warning of a statute's terms before its enactment can mitigate reliance and pointed to similar reasoning in *United States v. Hudson*, 299 U.S. 498 (1937) and in *United States v. Darusment*, 449 U.S. 292 (1981). *Peick v. PBGC* at 68-70.

The employees' reliance on the promise of vested pension benefits must be balanced against the employers' reliance on a defined contribution. I conclude, as did the Congress, that the employees' reliance interest outweighs the employers'. I also conclude that this factor does not weigh against the statute.

2. Previous Regulation of the Area

Pension plan termination is an area which is heavily regulated by the federal government. *Nachman*, 592 F.2d at 962. Even before ERISA, the area was regulated. See Treas. Reg. § 1.401-6, cited in *Nachman*, 592 F.2d at 962, n. 33. As stated above, section 10.03 of the Plan from which Gray withdrew acknowledges ERISA regulation of the employer's liability. As originally enacted, ERISA provided that an employer could incur a withdrawal liability which exceeded the obligation to pay contributions in the situation where a multiemployer plan terminated within five years. 29 U.S.C. §§ 1363, 1364. The previous regulation of this area leads me to conclude that this factor does not weigh against the statute.

3. The Equities

Congress was concerned that if the MPPAA became effective only upon enactment, passage would precipitate early withdrawals. *Peick v. PBGC* at 71. Congress had been concerned with the fact that ERISA itself encouraged withdrawals. *Id.* One of the Congressional concerns about early withdrawals was the effect on the relative equities between the early withdrawing employer and the employer who remained in the plan to face even greater liabilities after the enactment of the MPPAA. *Id.* Therefore the equities to be balanced are those between the employees, the withdrawn employer and the remaining employers. In light of the magnitude of the problem being addressed by Congress, I find that the equities balance in favor of the employees and remaining employers when considering the withdrawing employers' incurring a fixed debt upon withdrawal. Gray points to the fact that although Congress feared many withdrawals would be precipitated by

the legislation, in fact, they did not occur in great or even significant numbers. The fact that these fears were not realized does not mean that acts to forestall such events were irrational. I conclude that this factor does not weigh against the statute.

4. Statutory Provisions Limiting and Moderating the Burden

Gray's position is that the MPPAA contains virtually no provisions which moderate the burden and that the moderating factors fall short of those in the statute upheld in *Nachman*.

The MPPAA does contain some mitigating features. One example is the "*de minimis* rule," 29 U.S.C.A. § 1389(a), which eliminates withdrawal liability for employers whose obligation would be below \$50,000 or three fourths of one percent of the plan's unfunded vested obligations. The MPPAA does not require lump-sum payments but permits a schedule of payments under 29 U.S.C.A. § 1399(c).

Judge Hill in *Shelter Framing Corp.* and *G & R Roofing* concluded that the MPPAA had no significant features to moderate the imposition of a large liability, such as were present in *Nachman*: a grace period or a limitation of the employer's liability in relation to the employer's net worth. I agree with Judge Hill that the factor weighs against the statute.

C. Conclusion

Plaintiff carries a heavy burden of showing that the retroactivity of the MPPAA violates due process. To prevail, Gray must show the legislature acted in an "ar-

bitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15. Plaintiff has shown that the MPPAA can and does sometimes exact a heavy burden from an employer who withdraws from a multiemployer pension plan. Gray has also shown that there is a paucity of ameliorating features in the plan adopted. But Gray has not shown that the plan and its retroactive application are irrational solutions to a serious problem. The plaintiff has not carried its burden.

IMPAIRMENT OF CONTRACT RIGHTS

The contract clause of the United States Constitution applies only to the states. *Nachman*, 592 F.2d at 959. The due process clause of the fifth amendment is implicated in legislation affecting contract rights. *Id.* at 960. The standard of review for federal legislation affecting or impairing contract rights is not settled. *Id. Peick v. PBGC* at 33. I do not decide the standard to be applied, but rule that to the extent that the MPPAA survives Gray's due process claim, it survives Gray's claim of impairment of contract rights. See *Peick v. PBGC* at 33; *Nachman*, 592 F.2d at 959.

EQUAL PROTECTION

Gray contends that the different treatment of employers in single-employer pension plans and multiemployer pension plans violates the equal protection clause of the fifth amendment. Gray points to two distinctions:

- (1) employers who contribute to a multi-employer plan can be liable upon withdrawal from a plan which continues in existence. Single employers are liable only when a plan terminates.

(2) Single employers cannot become liable for more than thirty percent of their net worth. There is no upper limit on the liability of an employer who contributes to a multiemployer plan.

To prevail on this issue, Gray has the burden of showing that "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).

I find that Gray has not shown that the distinction between multiemployer and single-employer plans is irrational. As stated in the testimony of John B. Hall, Deputy Assistant Secretary for Tax Policy, Department of the Treasury, before a House Committee:

[A]mong defined benefit pension plans, there are wide variations. We quickly despaired of devising a separate system for each type of defined benefit pension plan. Nevertheless, we did find it useful to make a distinction between two broad groups of plans — single-employer plans and multiemployer plans.

Single-employer plans may cover only employees in a single plan or office, or may cover substantially all of a company's employees and plants throughout the country. These plans may or may not be collectively bargained. Most single-employer plans call for a specific benefit amount payable at retirement but do not specify a required employer contribution. They are generally administered by the employer and the employer generally has the right to terminate the plan at any time with no further liability for pension contributions.

Multiemployer plans have significantly different characteristics. They generally require a specific employer contribution. They generally are administered by a joint employer-employee board of trustees which has the authority to set benefits. The employer's obligation is generally limited to making the specific contribution and a participating employer cannot terminate the plan although he may withdraw from it. Because of these differences, it is difficult to draft one insurance program which applies to both types of plans. [Bills to Revise the Welfare and Pension Plans Disclosure Act: Hearings on H.R. 2 and H.R. 462 before the House General Subcommittee on Labor of the Committee on Education and Labor, 93rd Cong. 1st Sess. 768-769 (1973).]

In light of the different makeup of single and multiemployer plans, different treatment of the withdrawals from each is not irrational. The withdrawal from a multiemployer plan, in the absence of withdrawal liability, shifts the burden to remaining employers. This situation does not occur in a single-employer plan.

The elimination of the thirty percent limitation of liability for employers withdrawing from multiemployer plans has a harsh result, but was imposed because Congress wished to deter withdrawals and their deleterious effects. *Peick v. PBGC* at 77 (citing legislative history). I cannot conclude that the measure was irrational. Congress concluded that there was a great threat to multiemployer plans and took steps to lessen the threat.

I find that Gray has failed to carry its burden of showing that the MPPAA irrationally distinguishes between the multiemployer and single-employer plans.

EX POST FACTO

Gray's *ex post facto* argument is without merit. The prohibition of the enactment of an *ex post facto* law applies to a statute which "assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." *Weaver v. Graham*, 450 U.S. 24, 29 n. 13 (1981), cited in *Peick v. PBGC* at 74, n. ***. No criminal or penal consequences are involved in the statute or fact situation before me.

ARBITRATION PROCEDURE

Gray contends that the arbitration procedure of the MPPAA violates the rights to procedural due process and trial by jury. As stated above, Gray waived its right to arbitration under the MPPAA. Gray contends that waiver of the right to arbitrate did not constitute a waiver of the right to attack the validity of the arbitration provisions.

I conclude that Gray has no standing to contest the validity of the arbitration provisions of the MPPAA. To meet the standing requirements of Article III, a plaintiff must show that it "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, 102 S. Ct. 752, 758 (1982). Gray has failed to show that it comes within the "actual injury" requirement with respect to the arbitration provisions of the MPPAA.

CONCLUSION

The MPPAA survives Gray's motion for summary judgment. I conclude that summary judgment should enter in favor of the defendant.

Dated this 11th day of August, 1982.

/s/

James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

R.A. GRAY & CO.,) Civil No. 81-912-RE
Plaintiff,) OPINION
)
v.)
)
OREGON-WASHINGTON)
CARPENTERS-EMPLOYERS)
PENSION TRUST FUND and)
PENSION BENEFIT GUARANTY)
CORPORATION,)
Defendants.)

Thomas M. Triplett
Mildred J. Carmack
Schwabe, Williams, Wyatt,
Moore & Roberts
1200 Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

Attorneys for Plaintiff.

William B. Crow
Miller, Nash, Yerke,
Wiener & Hager
900 S. W. Fifth Avenue
Portland, Oregon 97204

David S. Paull
Bailey & Paull
5441 S. W. Macadam Avenue
Portland, Oregon 97201

Filed

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON

BY _____

Attorneys for Defendant
Oregon-Washington Carpenters-
Employers Pension Trust Fund

Henry Rose, General Counsel
Baruch A. Fellner, Associate General Counsel
J. Stephen Caflisch, Special Counsel
David F. Power, Attorney
Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant
Pension Benefit Guaranty Corporation.

REDDEN, JUDGE:

IT IS ORDERED that the plaintiff's motion for summary judgment is denied. **IT IS FURTHER ORDERED** that the defendants' motions for summary judgment are granted.

Dated this 11th day of August, 1982.

/s/

James A. Redden
United States District Judge

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

R.A. GRAY & CO.,) No. 82-3506
Plaintiff-Appellant,) DC CV 81-912 JAR
)
v.)
)
OREGON-WASHINGTON)
CARPENTERS-EMPLOYERS)
PENSION TRUST FUND and)
PENSION BENEFIT GUARANTY)
CORPORATION,)
)
Defendants-Appellees.)

APPEAL from the United States District Court for the
PORTLAND District of **OREGON**.

THIS CAUSE came on to be heard on the Transcript of
the Record from the United States District Court for the
PORTLAND District of **OREGON** and was duly submit-
ted.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court, that the judgment of
the said District Court in this Cause be, and hereby is
reversed.

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APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 82-3506

R.A. Gray & Co.

v.

**Oregon-Washington Carpenters-Employers
Pension Trust Fund and Pension Benefit
Guaranty Corporation**

On Appeal from the United States
District Court for the District of Oregon

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Pursuant to 28 U.S.C. § 1252, the Pension Benefit Guaranty Corporation hereby appeals to the Supreme Court of the United States from the judgment of this court in the above-captioned action entered on May 20, 1983.

/s/

BARUCH A. FELLNER
Associate General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served by first class mail, postage prepaid, on this 14th day of June, 1983, on all parties required to be served:

Thomas M. Triplett, Esquire
Schwabe, Williamson, Wyatt,
Moore & Roberts
1100 Southwest 6th Avenue
Suite 1200
Portland, Oregon 97204

William B. Crow, Esquire
Miller, Nash, Yerke,
Wiener & Hager
900 Southwest 5th Avenue
Portland, Oregon 97204

David S. Paull, Esquire
Bailey & Paull, Esquire
5411 Southwest Macadam Avenue
Portland, Oregon 97201

/s/

BARUCH A. FELLNER
Associate General Counsel

APPENDIX E

3/10/83

138 cases

**Litigation Attacking the
Constitutionality of MPPAA**

CASE	DATE	AMOUNT
<i>A. Soloff & Son, Inc. v. Jerry Asher, et al. and Trustees of the Amalgamated Cotton Garment and Allied Industries Fund</i> C.A. No. 82 Civ. 1981 (Z) (S.D.N.Y.)	11/7/80	\$219,533
<i>Acee Company, Inc. v. Central States, Southeast and Southwest Areas Pension Fund and General Drivers and Helpers Union Local 373</i> C.A. No. 82-2279 (W.D. Ark.) (filed 11/23/82)	1/4/82	\$202,513
<i>AGA Burdox, Inc. v. Central States, Southeast and Southwest Areas Pension Trust</i> C.A. No. (N.D. Ill.)	9/6/80	\$887,643
<i>Allan C. Ells v. The Construction Laborers Pension Trust for Southern California</i> C.A. No. 81-4910-TJH (Gx) (C.D. Calif.) (Hatter, J.) (filed 10/29/81) Summary judgment for defendant -6/3/82	7/1/80	\$291,135
<i>American Trucking Associations, Inc., et al. v. PBGC, et al.*</i> C.A. No. J82-0061 (R) (S.D. Miss., Jackson Div.) (Russell, J.) (filed 2/4/82)	April 1980	\$8,634,892

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<i>Arnold's, Inc., et al. v. Retail Store Employees Union AFL-CIO and Drug and Mercantile Employers Joint Pension Fund,</i> C.A. No. 8270734 (E.D. Mich., S.D.) (Boyle, J.) (filed 3/2/82)	1981	\$1,377,200
<i>Aronson Tire Co., Inc. v. Vincent Pisano, et al. and PBGC*</i> C.A. No. 81-2554-C (D. Mass.) (Caffrey, C.J.) (Served 10/28/81)	4/26/80 or 5/5/80	\$150,467
<i>Arrow Transportation v. New England Teamsters</i> C.A. No. 81-2703-S (D. Mass.) (Skinner, J.)	8/29/80	\$965,534
<i>Arrow Transportation v. Local 707 Road Carriers Welfare and Pension Fund</i> C.A. No. 82-CV-0360 (E.D.N.Y.) (Bramwell, J.) Settled and dismissed - 10/13/82	6/30/80	\$25,000
<i>Auclair Transportation, Inc. v. New England Teamsters</i> C.A. No. C-81-546-L (D.N.H.) (filed 10/30/81)	1/14/81	\$2,546,513
<i>Automotive Spring Corp., et al. v. National Industrial Group Pension Plan</i> C.A. No. 81-2921 (D.N.J.) (Meanor, J.) (filed 9/15/81)	7/27/80	\$502,874
<i>Avnet, Inc. v. Appleton, et al.</i> C.A. No. 82 Civ. 1119 (S.D.N.Y.) (Conner, J.) (filed 2/24/82)	12/7/80	\$153,565

<i>Avnet v. Central States, Southeast and Southwest Areas Pension Trust</i> C.A. No. 81-C-6132 (N.D. Ill. E.D.) (Aspen, J.) (filed October 30, 1981) Settled and dismissed - 8/6/82	10/5/81	\$313,143.87
<i>Bakersfield Concrete Construction, Inc., et al. v. Construction Laborers Pension Trust for Southern California</i> C.A. No. 82-0044-WPG (C.D. Calif.) (Gray, J.) (filed 1/6/82) Summary judgment for defendant -1/10/83	7/1/81	\$37,907.62
<i>Baldwin, et al. v. The Lincoln National Life Insurance Co.</i> C.A. No. 82-45-NW (E.D. Va., Newport News Div.)		
<i>Baldwin, et al. v. Shopmen's Ironworkers Pension Trust of Southern California</i> C.A. No. CV 81-5082 LTL (Mx) (C.D. Calif.) (Lydick, J.) (filed 9/30/81)	7/10/81	\$639,793
<i>Bangor Punta Corporation, et al. v. Pisano, et al. and PGGC*</i> C.A. No. 81-1688 Z (D. Mass.) (Zobel, J.)	8/20/80	\$571,740
<i>Brooke Bond Foods, Inc. v. John Cook, et al.</i> C.A. No. 81 Civ. 6077 (S.D.N.Y.) (Owen, J.)	4/7/80	\$1,085,900
<i>C & S Wholesale Grocers, Inc. v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 81-370 (D.Vt.) (Holdon, C.J.) (filed 12/2/81)	3/27/81	\$1,147,499

<i>Calvert & Youngblood Coal Co., Inc.</i> <i>v. UMWA 1950 Pension Trust,</i> <i>et al.</i> C.A. No. CV-82-P-1070-S (N.D. Ala., S.D.) (Pointer, J.) (filed 5/12/82)	3/27/81	\$484,074.72
<i>Center Corporation v. Council 30</i> <i>Retirement Plan et al.</i> C.A. No. 82-73130 (E.D. Mich.) (Taylor, J.) (filed 8/20/82)	12/30/80	\$1,175,682
<i>Cenco, Inc. v. Central States, South-</i> <i>east and Southwest Areas Pension</i> <i>Fund</i> C.A. No. 82-C-1867 (N.D. Ill., E.D.) (Leighton, J.) (filed 3/25/82) Settled and dismissed - 8/15/82	12/1/80	263,212
<i>Classic Chemical, Inc. v. International</i> <i>Association of Machinists</i> C.A. No. 382-0241F (N.D. Tex., Dallas Div.) (Porter, J.)	10/16/81	\$454,236
<i>Cleveland Metal Products Co., Inc. v.</i> <i>Teamsters Local No. 507 Pension</i> <i>Fund, et al.</i> C.A. No. C81-2543 (N.D. Ohio, E.D.) (Manos, J.) (filed 12/21/81)	10/5/81	\$302,100
<i>Connolly, et al. v. PBGC*</i> C.A. No. 75-2037 DWW (C.D. Calif.) (Williams, J.) (amended complaint filed 8/19/82)		

<i>Coronet Dodge, Inc. v. Fred R. Speckman, et al.</i> C.A. No. 81-0724C (E.D. Mo.) (Filippine, J.) (filed 6/18/81) Summary judgment for defendant- 9/30/82 App. No. 82-2554-EM (8th Cir.) (filed 12/27/82)	6/30/80	\$24,988
<i>Coronet Dodge, Inc. v. Loran W. Robbins, et al.</i> C.A. No. 82-0114-C(2) (E.D. Mo., E.D.) (Filippine, J.) Settled and dismissed - 6/29/82		
<i>Cott Corporation v. New England Teamsters and Trucking Industry Pension Fund</i> Bky., No. 2-80-00657 (D. Conn., Bky. Ct.)	2/6/81	\$1,279,757
<i>Cross Bros. Meat Packers, Inc., et al., v. Independent Packing Houses, Beef Boners, Slaughterhouse, Hotel and Restaurant Suppliers Industry and Union Pension Plan, et al.</i> No. 83-1430	11/16/79	\$1,357,466
<i>Crown Cork & Seal Co., Inc. v. District No. 9, et al.</i> C.A. No. 83-2875	July 1980	\$162,000
<i>D.J. Drywall, Inc. v. Orange Belt Painters Pension Fund</i> C.A. No. 81-5330-RJK (Gx) (C.D. Calif.) (Kelleher, J.) (filed 10/14/81)	6/30/80	\$225,672
<i>Dealers Transport Company v. Robbins, et al.</i> Bky. No. 80-21350 Adversary No. 81-1632 (Bky.Ct. W.D. Tenn.) (Third party complaint filed 12/3/81)	1/21/81	\$6,045,779

<i>Dorn's Transportation, Inc. et al. v. Trucking Employees of North Jersey Welfare Fund, Inc. - Pension Account</i> C.A. No. 82-122 (HCM) (D.N.J.) (Meanor, J.) (filed 1/15/82)	3/9/81	\$318,959
<i>E.E. Black, Ltd, et al. v. Hawaii Carpenters Pension Fund</i> C.A. No. 82-0045 (D. Hawaii) (filed 1/26/82) Dismissed by stipulation - 5/11/82	April 1981	
<i>Eberhard Foods, Inc. v. Retail Store Employees Union AFL/CIO and Food Employees Joint Pension Fund, et al.</i> C.A. No. G 82 23 CA1 (W.D. Mich. S.D.) (filed 1/15/82)	8/1/81	\$1,450,741
<i>Ex-Cell Home Fashions v. ILGWU</i> C.A. No. 81-4847 (S.D.N.Y.) (Owen, J.) (filed 12/16/81)	June 1981	\$265,340
<i>F.H. Cobb Company, et al. v. New York State Teamsters Conference Pension and Retirement Fund, et al.</i> C.A. No. 82-W-765 (N.D.N.Y.) (filed 7/21/82)	May 1980	\$846,385
<i>Federal Warehouse, Inc. and Federal Warehouse Trucking Co., Inc., New England Teamsters and Trucking Industrial Pension Fund</i> No. 83-0859-T (D. Mass.) (4/1/83)	1/31/82	\$54,380
<i>First Interstate Bank of California v. I.A.M. National Pension Fund</i> C.A. No. C 82 0753 WHO (N.D. Calif.) (Orrick, J.) (filed 2/23/82)	Feb. 1981	\$261,816

<i>Fisher Foods, Inc. v. Amalgamated Food and Allied Workers District Union No. 430 Pension Fund</i> C.A. No. C-3-82-387 (S.D. Ohio W.D.)	7/18/81	\$309,417
<i>Fisher Foods, Inc. v. The Ohio Meat-packers, Meat Cutters and Butcher Workmen Pension Plan and Trust</i> C.A. No. C82-1419 (N.D. Ohio, E.D.) (Lambros, J.) (filed May 28, 1982)	9/26/80	\$70,811
<i>Fisher Foods, Inc. v. UFCW Unions' and Food Employers Pension Plan of Central Ohio,</i> C.A. No. _____ (S.D. Ohio, E.D.) (rec'd 3/17/83)	Oct. 1981	\$2,786,017
<i>Flowers Industries, et al. v. Bakery and Confectionery Union and Industry International Pension Fund,</i> C.A. No. 82-1365 (N.D. Ga., Atl. Div.) (filed June 30, 1982)	9/5/80 7/16/80 1/31/80	\$1,268,494
<i>4-D Builders Supply v. Central States, Southeast and Southwest Areas Pension Trust</i> C.A. No. 81-10211 (E.D. Mich.) (Harvey, J.) (filed 11/2/81)	5/4/80	\$252,201
<i>Fox & Ginn, Inc. v. Pisano, et al. and PBGC*</i> C.A. No. 82-1078-K (D. Mass.) (Keeton, J.) (filed 4/26/82) PBGC dismissed as party - 7/27/82		\$22,230
<i>Frito-Lay, Inc. v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 82-1780-Ma (D. Mass.) (Mazzone, J.) (filed 6/24/82)	1981	\$482,502

<i>Fritz a. Nachant, Inc. v. Operating Engineers Pension Trust and PBGC*</i> C.A. No. 82-0373 (S.D. Calif.) (Thompson, J.) (amended complaint filed 6/7/82) Stayed pending outcome of <i>Connolly</i> App. No. 82-8120 (9th Cir.) (PBGC interlocutory appeal filed 8/11/82)	6/15/80	\$40,888
<i>G & R Roofing Co. v. Carpenters Pension Trust*</i> C.A. No. 81-5551 CBM (C.D. Calif.) (Hill, J.) (filed 10/27/81) PBGC intervention denied -3/15/82 App. No. 82-5272 (9th Cir.) (filed 3/16/82) Portion of MPPAA found unconstitutional - 4/13/82 App. Nos. 82-5461, 82-5462 (filed 4/30/82)	Aug. 1980	\$208,774
<i>Gangi Construction, et al. v. Operating Engineers Pension Trust for Southern California</i> C.A. No. 80-0043-JRK (Px) (C.D. Calif.) (Kelleher, J.) (filed 1/27/82)	7/1/80	\$174,227 \$212,246 \$28,881 \$283,878 \$45,526
<i>General Oil Co., et al. v. New England Teamsters</i> C.A. No. 81-2821-N (D. Mass.) (Nelson, J.) (filed 11/14/81)	1/5/81 5/31/81	\$252,512
<i>Gilmore Steel Corp. v. Western Conference of Teamsters Pension Fund</i> C.A. No. C 82-3993 (N.D. Calif.) (Patel, J.) (filed July 29, 1982)	8/13/80	\$946,248

<i>Gladding Corp. v. Amalgamated Cotton Garment and Allied Industries Fund</i> C.A. No. 83-CV-0554 (S.D.N.Y.) (Owen, J.) (filed 1/18/83)	6/25/82	\$207,507
<i>Grano Steel Corp. v. Shopmen's Ironworkers</i> C.A. No. CV 81-5862 LEW (JRx) (C.D. Calif.) (First amended complaint filed 11/25/81) (Waters, J.)	5/31/80	\$306,710
<i>H.M. Gammon Manufacturing Corp. v. Trustees of Amalgamated Insurance Fund</i> C.A. No. 81-7612 (S.D.N.Y.) Dismissed - 11/15/82	April 1980	\$146,842
<i>Hertz Corp. v. The Commission Salesmen, Drivers and Helpers Union Local 187 Pension Fund</i> C.A. No. 81-5034 (E.D. Pa.) (Fullam, J.)	2/1/81	\$393,079
<i>Intercity Transportation, Inc. v. PBGC, et al.*</i> C.A. No. 82-0256 (D. Mass.) (Keeton, J.) (filed 2/1/82)	6/1/81	\$997,193
<i>International Multifoods Corp. v. Central States, Southeast and Southwest Areas Pension Fund</i> C.A. No. 81 C 6927 (N.D. Ill., E.D.) (McGarr, J.) (filed 12/11/81)	6/15/80	\$227,518
<i>Interstate United Corporation of Michigan v. Council 30, etc.</i> C.A. No. 81-74664 (E.D. Mich., S.D.) (DeMascio, J.) (filed 12/15/81)	May 1981	\$364,535

<i>IUE AFL-CIO Pension Fund, et al. v. Erie Universal Products Corp.</i> C.A. No. 82-2252 (D.N.J.) (Sarokin, J.) (filed 7/14/82) Constitutional issued raised by summary judgment motion - 12/20/82	3/13/81	\$23,728
<i>Johnson Motor Lines, et al. v. Central States, Southeast and Southwest Areas Pension Fund, et al.</i> C.A. No. 81 C 3703 (N.D. Ill. E.D.) (Hart, J.)	8/8/80	\$16,658,936
<i>Johnson Motor Lines, et al. v. Trucking Employees of North Jersey Local 560 Pension Fund</i> C.A. No. 81-2344 (D.N.J.) (Meanor, J.)	8/8/80	\$645,012
<i>Jos. Schlitz Brewing Co. v. PBGC, et al.*</i> C.A. No. 82-C-0340 (E.D. Wis.) (Warren, J.) (filed March 19, 1982)	5/31/81	\$41,031,406
<i>1219 K.H. Mens Wear, Inc., d/b/a Neil's v. Trustees of the Amalgamated Insurance Fund</i> C.A. No. 82-1742 (S.D.N.Y.)	May 1980	\$14,410
<i>Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 81-2378-S (D. Mass.) (Skinner, J.) (filed 10/27/81)	11/10/80	\$468,637
<i>Kraft, Inc. v. Edward J. Malone, et al.</i> C.A. No. 81-930C(A) (E.D. Mo. E.D.) (Harper, J.) (filed 9/4/81)	5/30/81	\$1,987,748

<i>Kraft, Inc. v. New York State Teamsters Conference Pension & Retirement Fund, et al.</i> C.A. No. 82-CV-1261 (N.D.N.Y.) (filed 11/12/82)	3/24/81	\$543,969
<i>Laredo Warehouse & Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund</i> C.A. No. L-83-3 (S.D. Tex.) (filed 1/20/83)	8/11/82	\$175,708
<i>Lawrence Motor Lines, Inc. v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 81-3327-Ma (D. Mass.) (Mazzone, J.) (filed 12/31/81)	3/31/80	\$51,804
<i>Lewis & Coker Super Markets, Inc. v. United Food & Commercial Workers International Union — Industry Pension Fund</i> C.A. No. CA3-81-2071H (N.D. Tex., Dallas Div.) (Barefoot Sanders, J.) (filed 11/22/81)	May 1981	\$572,119
<i>Lloyds Acceptance Corp. v. Amalgamated Food & Allied Workers District Union No. 430 Pension Plan</i> C.A. No. C-3-82-169 (S.D. Ohio, W.D.)	June 1980	\$1,029,000
<i>MacMillan, Inc. v. Amalgamated Insurance Fund</i> C.A. No. 81-CIV-6610 (S.D.N.Y.) (Brieant, J.) (filed 10/28/81)	7/25/80	\$1,165,656
<i>Malcolm Boring Co., Inc. v. Operating Engineers Pension Trust</i> C.A. No. 81-6046-TJH (Kx) (C.D. Calif.) (Hatter, J.) (filed 11/27/81)	June 1980	\$200,941

Manning Bros. Rock & Sand Co. v. PBGC, et al.* C.A. No. CV-81-6123 RMT (Tx) (C.D. Calif.) (Takasugi, J.) (filed 12/3/81)	8/30/80	\$204,584
Merit Clothing Co., Inc. v. PBGC, et al.* C.A. No. 82-0005 (W.D. Ky., Paducah Div.) (Johnstone, J.) (filed 1/21/82) Agreed order of dismissal - 11/23/82	9/26/80	\$4,043,846
Metropolitan Distributors, Inc. and Delphi Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, et al. and PBGC, C.A. No. 82-C4306 (N.D. Ill. E.D.) (Moran, J.) (filed July 12, 1982)	Sept. 1981	\$120,475.10
Motorways Leasing, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, et al. C.A. No. 8270630 (E.D. Mich. S.D.) (Freeman, J.) (filed 2/22/82)	May 1980	\$587,773
Mr. Pleat, et al. v. ILGWU National Retirement Fund C.A. No. 821622 AAH (C.D. Calif.) (Hauk, J.) (filed 4/1/82)	7/31/80	\$182,204 \$55,742 \$32,814 \$71,110
Municipal Engineers, Inc. v. Operating Engineers Pension Trust and PBGC* C.A. No. 82-0372 (S.D. Calif.) (Nielsen, J.) (amended complaint filed 6/7/82)	7/71/80	\$118,701

<i>National Steel Service Center, Inc. v. Central States, Southeast, and Southwest Areas Pension Fund, et al.</i> C.A. No. 82 C 5315 (N.D. Ill., E.D.) (McGarr, J.) (filed 8/27/82)	7/31/80	\$184,452
<i>National Tea Packing Co., Inc. v. Retail, Wholesale & Department Store International Union and Industry Pension Fund, et al.</i> C.A. No. CV 82-1365 (E.D.N.Y.) (Platt, J.) (filed 5/18/82)	1/1/81	\$406,698
<i>National Wine and Spirits Corp. v. Central States, Southeast, and Southwest Areas Pension Fund, et al.,</i> C.A. No. IP 83-40C (S.D. Ind.) (filed 1/7/83)	7/8/80	\$452,030
<i>Oxford Hopkins Co., Inc. v. IUE AFL-CIO Pension Fund, et al.</i> C.A. No. 82-2632-N (D. Mass.)	11/28/81	\$245,532
<i>Ozark Empire Distributors, Inc. v. Bakery & Confectionery Union and Industry International Pension Fund</i> C.A. No. 82-5031 (W.D. Ark.) (filed 2/12/82) Settled -	4/29/80	\$74,188
<i>Pacific Iron & Metal Company v. Western Conference of Teamsters Pension Trust Fund</i> C.A. No. C82-653 (W.D. Wash., Seattle Div.) (filed 5/27/82) Summary judgment for defendant - 10/13/82	10/1/81	\$84,830

<i>Pantry Pride, Inc. and Pantry Pride Enterprises, Inc. v. Retail Clerks Tri-State Pension Fund, et al.</i> C.A. No. 83-0466 (E.D. Pa.) (filed 1/28/83)	July 1981	\$20,935,050
<i>Peick, et al. v. PBGC, et al.*</i> C.A. No. 81 C 1911 (N.D. Ill. E.D.) (Getzendanner, J.) Summary judgment for defendant - 5/14/82 No. 82-2081 (7th Cir.) (filed 7/7/82)		
<i>Penfield & Smith Engineers, Inc. v. Operating Engineers Pension Trust and PBGC*</i> C.A. No. 82-0371 (S.D. Calif.) (Keep, J.) (amended complaint filed 6/7/82)	9/15/80	\$210,872
<i>Penn Elastic Company v. United Retail and Wholesale Employees Union, Local 115 Joint Pension Fund</i> C.A. No. 82-0777 (E.D. Pa.) (Van Artsdalen, J.) (filed 2/19/82)	8/10/81	\$894,134
<i>Pershing Industries, et al. v. Trustees of the Cotton Garment & Allied Industries Pension Fund</i> No. 81-CIV-7469-ES (S.D.N.Y.) (Stewart, J.)	5/24/80	\$20,669
<i>Product Miniature Company, Inc. v. I.A.M. National Pension Fund</i> C.A. No. 82-C-0136 (E.D. Wis.) (Reynolds, C.J.) (filed 2/10/82) Settled and dismissed - 6/21/82	11/1/80	\$197,578

<i>Production Machinery Corp. v. Northwest Ohio Area Industries UAW Retirement Income Plan</i> C.A. No. C83-323 (N.D. Ohio, W.D.) (Potter, J.) (4/7/83)	March Early April 1980	\$240,858
<i>PYA/Monarch, Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al.</i> C.A. No. 81 C 5491 (N.D. Ill. E.D.) (Flaum, J.) (filed 10/1/81)	6/26/81	\$381,594
<i>R.A. Gray & Co. v. Oregon-Washington Carpenters - Employers Pension Trust Fund and PBGC*</i> C.A. No. 81-912 (D. Ore.) (Redden, J.) Summary judgment for defendant-8/12/82 App. No. 82-3506 (9th Cir.) (filed 9/10/82)	6/1/80	\$201,359
<i>RCB Construction, Inc., et al. v. Silver, et al.</i> C.A. No. CV-81-5350 RJK P (x) C.D. Calif.) (Kelleher, J.) (first amended complaint filed 10/27/81)	7/1/81	\$163,057 \$26,048 \$8,797 \$349,544 \$129,158
<i>R.T. Curtis, Inc. v. Pisano, et al PBGC*</i> C.A. No. 82-1130-Z (D. Mass.) (Zobel, J.) (filed 4/29/82)	12/30/80	\$79,458

<i>Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund</i> C.A. No. 82-0146 (E.D. Pa.) (Troutman, J.) Defendant motion to dismiss granted - 3/22/82 App. No. 82-1251 (3d Cir.) (filed 4/21/82) Reversed and remanded for arbitration - 11/19/82	8/8/80	\$848,494
<i>Republic Industries, Inc. v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 81-2551-S (D. Mass.) (Skinner, J.)	8/8/80	\$1,402,961
<i>Republic Industries, Inc. v Teamsters Joint Council No. 83 of Virginia Pension Plan</i> C.A. No.82-0919-A (E.D. Va.) (filed 10/5/82) Withdrawal liability provisions constitutional - 12/29/82 App. No. 83-1054 (L) (4th Cir.) (filed 1/28/83)	8/8/80	\$189,107
<i>Rhode Island Welding Supply Co., Inc. v. New England Teamsters & Trucking Industry Pension Fund</i> C.A. No.82-0041-G (D. Mass.) (Garrity, J.) (filed 1/27/82)	3/31/80	\$7,314
<i>Robbins, et al. v. PBGC*</i> C.A. No. 79 C 2601 (N.D. Ill. E.D.) (McGarr, C.J.)		
<i>Robert Fawcett & Son Company, Inc. v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 81-3134-G (D. Mass.) (Garrity, J.) (filed 12/23/81)	3/31/81	\$33,445

<i>Robertson's Linen Service v. Central States, Southeast and Southwest Areas Pension Trust</i> C.A. No. 81-74350 (E.D. Mich.) (Cook, J.)	6/11/80	\$124,269
<i>Rockford Drop Forge Co. v. International Association of Machinists National Pension Fund</i> C.A. No. 81 C. 5774 (N.D. Ill. E.D.) (Aspen, J.) (filed 10/15/81) Dismissed - 12/4/81	4/27/80	\$45,007
<i>Roy L. Klema Engineers, Inc. v. Operating Engineers Pension Trust and PBGC*</i> C.A. No. 82-0370 (S.D. Calif.) (Turrentine, J.) (amended complaint filed 6/7/82) Stayed pending outcome of <i>Connolly</i> App. No. 82-8120 (9th Cir.) (PBGC interlocutory appeal filed 8/11/82)	Aug. 1980	\$173,903
<i>S & M Paving, Inc. v. The Construction Laborers Pension Trust for Southern California</i> C.A. No. CV-81-5929 Kn P(x) (C.D. Calif.) (Hatter, J.) (filed 11/19/81) Summary judgment for defendant- 5/10/82	7/1/80	\$160,347
<i>Salem Laundry Co. v. New England Laundry Workers Pension Fund, et al.</i> C.A. No. 82-2749-G (D. Mass.)		

<i>Salem Laundry Co. v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. 81-3160-G (D. Mass.) (Garrity, J.)	11/30/80	\$173,831
<i>San Diego Gas & Electric Co. v. Western Conference of Teamsters Pension Trust Fund and PBGC*</i> C.A. No. 82-0459-GT (S.D. Calif.) (Thompson, J.) (filed 5/5/82) Arbitration pending	June 1980	\$162,921
<i>Sands, Taylor, Wood & Co. v. Grady</i> C.A. No. 82-0726 (D. Mass.) (Nelson, J.) (filed 3/16/82) Decision finding that administrative remedies not required - 10/5/82		
<i>Shelter Framing Corporation v. Carpenters Pension Trust for Southern California*</i> C.A. No. 81-4457 (C.D. Calif.) (Hill, J.) PBGC intervention denied -3/15/82 App. No. 82-5271 (9th Cir.) (filed 3/16/82) Portion of MPPAA found unconstitutional - 4/13/82 App. Nos. 82-5460 (filed 4/30/82)	7/1/80	\$797,648
<i>Shull Truck Line Company, Inc. v. Central States, Southeast, and Southwest Areas Pension Fund</i> C.A. No. 81-1184 (W.D. Tenn.) (filed 11/17/81)	8/15/80	\$96,303

<i>Sibley, Lindsay & Carr Co. v. Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, et al.</i> C.A. No. 82-555T (W.D.N.Y.) (filed June 23, 1982) Appeal filed 2nd Cir. - No. 83-7328	5/31/80	\$315,927
<i>Sierra Pacific Industries v. The Lumber Industry Pension Fund & PBGC, et al. *</i> C.A. No. No. CIV S-82-459 LKK (E.D. Calif.) (Karlton, J.) (filed 6/7/82)	5/8/80	\$66,265
<i>Specialty Paper Box Co. v. The Paper Industry Union-Management Pension Fund</i> C.A. No. 82-2945-KH (NCx) (C.D. Calif.) (filed 6/11/82)	8/17/81	\$547,400
<i>Fred R. Speckmann, et al. v. Barford Chevrolet Company</i> C.A. No. 81-0795(C) (E.D. Mo.) (Meredith, J.) (filed 17/7/81) Summary judgment for defendant - 3/10/82	4/29/80	\$38,988
<i>Fred R. Speckmann, et al. v. Suburban Ford Sales, Inc.</i> No. 81-891 C (2) (E.D. Mo.) (Nangle, J.)	9/1/80	\$49,035
<i>Spector Red Ball, Inc., et al. v. PBGC, et al. *</i> Adv. No. 5-82-0491-T (W.D. Tex. (Bky.)) (filed 10/19/82)	4/26/81 or 4/26/82	\$1,054,861

<i>Stoeven Brothers v. California-Butchers Pension Trust Fund</i> C.A. No. C-82-0558 (RFP) (N.D. Calif.) (Peckman, C.J.) (filed 2/4/82)	March 1981	\$845,652
<i>Stop & Shop Companies, Inc. v. Local 464A Pension Fund</i> C.A. No. 81-4028 (D.N.J.) (Meanor, J.) (filed 12/30/81)	8/22/81	\$899,630
<i>Tanney's Motor Transportation, Inc. v. New York State Teamsters Conference Pension and Retirement Fund, et al.</i> C.A. No. 82-CV-801 (N.D.N.Y.) (Munson, J.)	3/31/80	\$281,494
<i>Teamsters Joint Council No. 83 of Virginia Pension Fund, et al. v. The Davidson Transfer and Storage Co.</i> C.A. No. 81-1007-R (E.D. Va., Richmond Div.) (filed November 13, 1981)	5/1/82	\$1,741,466
<i>Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.</i> No. 83-7004	6/9/80	\$900,000
<i>The Hunter Corporation v. New England Teamsters and Trucking Industry Pension Fund</i> C.A. No. B-82-325 (D. Conn.) (filed 6/3/82)	5/11/81	\$200,956
<i>The TJM Corporation, et al. v. Board of Trustees, Paper Converters-Local 286 Pension Plan and PBGC*</i> C.A. No. 82-4117 (E.D. Pa.) (Hannum, J.) (filed 6/10/82) PBGC dismissed as party - 1/3/83	July 1980	\$200,627

<i>The Terson Company, Inc. v. Bakery Drivers & Salesmen Local 194 and Industry Pension Fund</i> C.A. No. 82-4058 (SH) (D.N.J.) (Sarokin, J.)	Oct. 1980	\$835,320
<i>The Terson Company, Inc. v. PBGC, et al.*</i> C.A. No. 81 C 4176 (N.D. Ill. E.D.) (McGarr, C.J.) Dismissed on basis of arbitration award -	Oct. 1980	\$835,320
<i>The Washington Star Co. v. International Typographical Union Negotiated Pension Plan</i> C.A. No. 82-1568 (D.D.C.) (Green, J.) (filed June 8, 1982) Summary judgment for defendant - 2/9/83	Aug. 1981	\$485,007
<i>T.I.M.E.-DC, Inc. v. Management-Labor Welfare and Pension Funds of Local 1730 International Longshoremen's Association</i> C.A. No. 82-6659 (VLB) (S.D.N.Y.) (Broderick, J.) (filed 10/7/82)	3/27/81	\$206,200
<i>T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, Inc.</i> C.A. No. 82 Civ. 3212 (E.D.N.Y.) (filed 10/25/82)	4/8/82	\$373,628

<i>Transport Motor Express, Inc., et al.</i>	4/24/80	\$8,071,885
<i>v. Central States, Southeast and</i>	or	
<i>Southwest Areas Pension</i>	4/26/80	
<i>Fund, et al.</i>		
C.A. No. 81 C 4535 (N.D.		
Ill. E.D.)		
(Flaum, J.) (filed 8/10/81)		
Appeal filed 2nd Cir — No. 83-2026		
 <i>UFCW International Union-</i>		
<i>Industry Pension Fund and</i>		
<i>John E. Boyd v. The Schear</i>		
<i>Group, Inc., et al.</i>		
C.A. No. ____ (S.D. Ohio, W.D.)		
(filed January __, 1982)		
 <i>UFCW Unions and Food Employers</i>		
<i>Pension Plan of Central Ohio and</i>	Jan. 1981	\$3,479,130
<i>Kenneth V. Mitchell v. The Shear</i>		
<i>Group, Inc., et al.</i>		
C.A. No. C-3-81-439 (S.D. Ohio,		
W.D.)		
(Rice, J.) (filed November __,		
1981)		
 <i>United Engine & Machine Co., Inc. v.</i>		
<i>International Association of</i>	April	\$1,769,531
<i>Machinists and Aerospace Workers</i>	1981	
<i>AFL-CIO, National Pension Fund</i>		
C.A. No. C 82 2032 TEH		
(N.D. Calif.)		
(Henderson, J.) (filed 5/5/82)		
 <i>Universal Sewer Pipe Company v.</i>		
<i>United Brick and Clay Workers of</i>	4/28/80	\$416,010
<i>America, AFL-CIO, District</i>		
<i>Council #9 Pension Fund</i>		
C.A. No. 2-82-55 (S.D.		
Ohio, E.D.)		
(filed 1/15/82)		
Dismissed - 4/1/82		

<i>Vesci, Inc. v. Central States, Southeast and Southwest Areas Pension Fund</i> C.A. No. 81-7286 (N.D. Ill. E.D.) (Kocoras, J.) (filed 12/30/81)	7/1/80	\$142,044
<i>Victor Construction Co. v. The Construction Laborers Pension Trust for Southern California</i> C.A. No. 81-5144-TJH (Gx) (C.D. Calif.) (Hall, J.) (filed 10/29/81) PBGC motion to dissolve injunc- tion denied - 3/7/82 App. No. 82-5479 (filed 5/12/82) Appeal dismissed - 11/30/82	1/1/81	\$77,360
<i>Warner-Lamber Co., Inc. v. United Retail and Wholesale Employees' Teamster Local No. 115 Pension Fund</i> C.A. No. 82-1080 (E.D. Pa.) (Van Artsdalen, J.) (filed 3/10/82)	9/19/80	\$1,417,533
<i>Winn-Dixie Stores, Inc. v. UFCW International Union-Industry Pension Fund</i> C.A. No. 82-491-Civ-J-JHM (M.D. Fla., Jacksonville Div.)	6/27/80	\$111,094
<i>Witte Transportation Co., et al. v. Central States, Southeast and Southwest Areas Pension Fund, et al.</i> C.A. No. 4-81-472 (D. Minn.) (Lord, J.)	6/14/80	\$2,193,714
<i>Woodward Sand Co., Inc. v. Operating Engineers Pension Trust</i> C.A. No. 81-920-N(I) (S.D. Calif.) (Nielsen, J.) (filed 9/23/81)	8/15/80	\$264,524

*Cases in which PBGC is a party.

APPENDIX F

29 U.S.C. (1976).

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability

of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1002

* * *

(37) (A) The term "multiemployer plan" means a plan —

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective-bargaining agreements between an employee organization and more than one employer,

(iii) under which the amount of contributions made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year by all employers making such contributions,

(iv) under which benefits are payable with respect to each participant without regard to the cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such plan, and

(v) which satisfies such other requirements as the Secretary may by regulations prescribe.

(B) For purposes of this paragraph —

(i) if a plan is a multiemployer plan within the meaning of subparagraph (A) for any plan year, clause (iii) of subparagraph (A) shall be applied by substituting "75 percent" for "50 percent" for each subsequent plan year until the first plan year following a plan year in which the plan had one employer who made contributions of 75 percent or more of the aggregate amount of contributions made under the plan for that plan year by all employers making such contributions, and

(ii) all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(e)(3)(C) of Title 26) shall be deemed to be one employer.

§ 1302. Establishment; powers; board of directors; board meetings; bylaws and rules; exemption from taxation; budget; advisory committee

(a) There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

§ 1322. Benefits guaranteed

(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it.

(b)(1) Except to the extent provided in paragraph (8) —

(A) no benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates shall be guaranteed under this section, and

(B) any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.

(2) For purposes of this subsection, the time a successor plan (within the meaning of section 1321(a) of this title) has been in effect includes the time a previously established plan (within the meaning of section 1321(a) of this title) was in effect. For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60 month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.

(3) The amount of monthly benefits described in subsection (a) of this section provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of —

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) \$750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 430 of Title 42) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

The provisions of this paragraph do not apply to non-basic benefits.

(4)(A) The actuarial value of a benefit, for purposes of this subsection, shall be determined in accordance with regulations prescribed by the corporation.

(B) For purposes of paragraph (3) —

(i) the term “gross income” means “earned income” within the meaning of section 911(b) of Title 26 (determined without regard to any community property laws),

(ii) in the case of a participant in a plan under which contributions are made by more than one employer, amounts received as gross income from any employer under that plan shall be aggregated with amounts received from any other employer under that plan during the same period, and

(iii) any non-basic benefit shall be disregarded.

(5) Notwithstanding paragraph (3), no person shall receive from the corporation for basic benefits with respect to a participant an amount, or amounts, with an actuarial value which exceeds a monthly benefit in the form of a life annuity commencing at age 65 equal to the amount determined under paragraph (3)(B) at the time of the last plan termination.

(6)(A) For purposes of this subchapter, the term "substantial owner" means an individual who—

(i) owns the entire interest in an unincorporated trade or business,

(ii) in the case of a partnership, is a partner who owns, directly or indirectly, more than 10 percent of either the capital interest or the profits interest in such partnership, or

(iii) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of clause (iii) the constructive ownership rules of section 1563(e) of Title 26 shall apply (determined without regard to section 1563(e)(3)(C)). For purposes of this subchapter an individual is also treated as a substantial owner with respect to a plan if, at any time within the 60 months preceding the date on which the determination is made, he was a substantial owner under the plan.

(B) In the case of a participant in a plan under which benefits have not been increased by reason of any plan amendments and who is covered by the plan as a substantial owner, the amount of benefits guaranteed under this section shall not exceed the product of—

(i) a fraction (not to exceed 1) the numerator of which is the number of years the substantial owner was an active participant in the plan, and the denominator of which is 30, and

(ii) the amount of the substantial owner's monthly benefits guaranteed under subsection (a) of this section (as limited under paragraph (3) of this subsection).

(C) In the case of a participant in a plan, other than a plan described in subparagraph (B), who is covered by the plan as a substantial owner, the amount of the benefit guaranteed under this section shall, under regulations prescribed by the corporation, treat each benefit increase attributable to a plan amendment as if it were provided under a new plan. The benefits guaranteed under this section with respect to all such amendments shall not exceed the amount which would be determined under subparagraph (B) if subparagraph (B) applied.

(7)(A) No benefits accrued under a plan after the date on which the Secretary of the Treasury issues notice that he has determined that any trust which is a part of a plan does not meet the requirements of section 401(a) of Title 26, or that the plan does not meet the requirements of section 404(a)(2) of Title 26, are guaranteed under this section unless such determination is erroneous. This subparagraph does not apply if the Secretary subsequently issues a notice that such trust meets the requirements of section 401(a) of Title 26 or that the plan meets the requirements of section 404(a)(2) of Title 26 and if the Secretary determines that the trust or plan has taken action necessary to meet such requirements during the period between the issuance of the notice referred to in the preceding sentence and the issuance of the notice referred to in this sentence.

(B) No benefits accrued under a plan after the date on which an amendment of the plan is adopted which causes the Secretary of the Treasury to determine that any trust under the plan has ceased to meet the requirements of section 401(a) of Title 26 or that the plan has ceased to meet the requirements of section 404(a)(2) of Title 26, are guaranteed under this section unless such determination is erroneous. This subparagraph shall not apply if the amendment is revoked as of the date it was first effective or amended to comply with such requirements.

(8) Benefits described in paragraph (1) are guaranteed only to the extent of the greater of—

(A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or

(B) \$20 per month,

multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect. In determining how many years a plan or amendment has been in effect for purposes of this paragraph, the first 12 months following the date on which the plan or amendment is made or first becomes effective (whichever is later) constitutes one year, and each consecutive period of 12 months thereafter constitutes an additional year. This paragraph does not apply to benefits payable under a plan unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter.

(c) The corporation is authorized to guarantee the payment of such other classes of benefits and to establish the

terms and conditions under which such other classes of benefits are guaranteed as it determines to be appropriate.

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. Amounts guaranteed by the corporation under section 1322 of this title shall be paid by the corporation out of the appropriate fund.

§ 1362. Liability of employer

Employers covered

(a) This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply —

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

Amount of liability

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of —

(1) the excess of —

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

§ 1364. Liability of employers on termination of plan by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 of this title except that the amount of the liability determined under section 1362(b)(1) of this title with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction —

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 1362(b)(2) of this title shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

§ 1381. Effective date; special rules

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan —

(1) which is not a multiemployer plan,

(2) which terminate after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability which might be imposed under subtitle D if the plan terminated on or after September 2, 1974. The provisions of subtitle D do not apply in the case of such a plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

(c)(1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before January 1, 1978. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the Committee on Labor and Public Welfare and the Committee on Finance of the Senate.

(2) The corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before January 1, 1978, if—

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after December 31, 1977.

29 U.S.C. (SUPP. V 1981).

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute

under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

§ 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable —

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before April 29, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before April 19, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

§ 1399. Notice, collection, etc. of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall —

(A) notify the employer of —

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer —

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

- (i) the plan sponsor's decision,
- (ii) the basis for the decision, and
- (iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of a withdrawal described in subparagraph (D.)

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan —

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of—

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an

employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means —

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules —

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

§ 1401. Resolution of disputes.**(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.**

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this sec-

tion, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance

with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of this evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of —

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

§1461. Effective date; special rules

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan —

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability which might be imposed under subtitle D of this subchapter if the plan terminated on or after September 2, 1974. The provisions of subtitle D of this subchapter do not apply in the case of such a plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

(c)(1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before August 1, 1980. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the

Committee on Labor and Human Resources and the Committee on Finance of the Senate.

(2) The corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if —

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after July 31, 1980.

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this chapter made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on September 26, 1980.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability, takes effect on April 29, 1980.

APPENDIX G**PUBLIC LAW 95-214 [H.R. 9378]; Dec. 19, 1977
EMPLOYEE RETIREMENT INCOME SECURITY
ACT OF 1974**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone, for two years, the date on which the corporation first begins paying benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 4082(c) of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) is amended —

- (1) by striking, "January 1, 1978" in paragraph (1) and substituting "July 1, 1979";
- (2) by striking "January 1, 1978" in paragraph (2) and substituting "July 1, 1979";
- (3) by striking "December 31, 1977" in paragraph (2)(B) and substituting "June 30, 1979";
- (4) by striking "January 1, 1978" in paragraph (4) and substituting "July 1, 1979";
- (5) by striking "December 31, 1977" in paragraph (4)(D) and substituting "June 30, 1979".

(b) Section 4082 of such Act is amended by adding at the end thereof the following new subsections:

"(d) The corporation shall present to the Committee on Education and Labor of the House of Representatives and the Committee on Human Resources and the Committee on Finance of the Senate a report which comprehensively

addresses the anticipated financial condition of the program relating to mandatory coverage of multiemployer plans, including possible events which might cause the corporation to experience serious financial difficulty after July 1, 1979. Such report shall include an explanation of any alternative courses of action which might be taken by the corporation to insure proper coverage of multiemployer plans and the proper financing of the program relating to such plans. If the report contains recommendations for amendments to this title, such recommendations shall be fully explained, and shall be accompanied by explanations of other options for legislative change considered and rejected by the corporation. The report shall be presented by July 1, 1978.

**PUBLIC LAW 96-24 [H.R. 3915]; June 19, 1979
EMPLOYEE RETIREMENT INCOME SECURITIES
ACT OF 1974**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for 10 months the date on which the corporation must may benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, is further amended —

- (1) by striking "July 1, 1979" in paragraphs (1),
- (2) and (4) and substituting "May 1, 1980" in each such paragraph; and

(2) by striking "June 30, 1979" in paragraphs 2(B) and 4(D) and substituting "April 30, 1980" in each such paragraph.

Approved June 19, 1979.

**PUBLIC LAW 96-239 [H.R. 7140]; April 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY
ACT OF 1974 — BENEFITS**

An Act amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for two months the date on which the Pension Benefit Guaranty Corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214 and Public Law 96-24, is further amended—

(1) by striking "May 1, 1980" in paragraphs (1), (2), and (4) and substituting "July 1, 1980" in each such paragraph; and

(2) by striking "April 30, 1980" in paragraphs 2(B) and 4(D) and substituting "June 30, 1980" in each such paragraph.

Approved April 30, 1980.

**PUBLIC LAW 96-293 [H.R. 7685]; June 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY
ACT OF 1974**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for one month the date on which the corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, Public Law 96-24, and Public Law 96-239 is further amended—

(1) by striking “July 1, 1980” in paragraphs (1), (2), and (4) and substituting “August 1, 1980” in each such paragraph; and

(2) by striking “June 30, 1980” in paragraphs 2(B) and 4(D) and substituting “July 31, 1980” in each such paragraph.

Approved June 30, 1980.

APPENDIX H

**PENSION BENEFIT GUARANTY
CORPORATION**

Multiemployer Study

Required By

P.L. 95-214

— JULY 1, 1978 —

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* * * * *

[57] Under this arrangement, there would be no employer liability per se, but there would be an obligation to continue funding the plan at the rate established in collective bargaining. As a control on potential abuse, this rate would be required to be at least the same percent of the monetary wage package as that negotiated before the plan qualified for reorganization.¹⁵

¹⁴Cont.)

reorganization appeared necessary would not be eligible for PBGC ongoing financial assistance, and if it terminated it would be subject to the guarantee and employer liability provisions discussed in Section D, below. The two exceptions are:

(1) Plans that are already at Level II at the time the program is enacted. On the basis of preliminary PBGC data, the number of plans that would immediately qualify for Level II reorganization is relatively small and only a few plans would immediately qualify for financial assistance.

(2) Plans which do not qualify for Level I reorganization but which, during a short period (one or two plan years), experience sharp declines in the contribution base or in the level of plan assets large enough to qualify the plan for Level II reorganization.

¹⁵The PBGC is studying whether additional controls may be necessary to assure that contributions are at a reasonable level relative to benefit levels promised by the plan. Possible ways to restrict the use of premium funds to the most deserving plans would be to limit further the conditions under which PBGC assistance is provided or to restrict the amount of assistance unless the PBGC makes an individual finding of need.

c. Guarantees and Employer Liability for Terminated Plans

The significant variables in restructuring termination insurance are employer liability and the amount of guaranteed benefits. These are the two variables that PBGC can utilize to control the incidence of termination (encourage plan continuance) and program costs for those [58] plans that do not terminate. Employer liability represents the cost to the employer, and to a certain extent to participants, of plan termination, while the level of guarantees represents the cost to participants of plan termination. High guarantees and low employer liability, for example, may result in a high incentive for termination and high program costs, because of the low cost of termination to all parties to the plan. Conversely, low guarantees and high employer liability should result in a low incidence of termination and modest program costs, at least initially, because of the high cost of plan termination on all parties. The latter, however, could have adverse long-run consequences on the growth and continuance of multiemployer plans and the insurance program, because multiemployer plans could be less attractive to employers and participants than other types of benefit arrangements, thus resulting in a loss of current and potential contributors.

Section D of this part of the report presents five alternative approaches to termination guarantees and employer liability which PBGC is considering to control the incidence of terminations and program costs. They are:

- (1) employer liability for full vested benefits and reduced benefit guarantees,
- (2) employer liability for guaranteed benefits only and reduced benefit guarantees,
- (3) no employer liability and no benefit guarantees,¹⁶
- (4) employer liability for guaranteed benefits only and reduced benefit guarantees if the plan imposes withdrawal liability on withdrawing employers, otherwise no benefit guarantees and no employer liability, and
- (5) employer liability only for the guaranteed benefits of retirees and those within five years of normal retirement, and benefit guarantees only for such participants.

Under these approaches, with the exception of Program 3, employer liability would not be limited to 30 percent of net worth, *i.e.*, the present statutory limit,¹⁷ but instead employers would continue to fund their share of the unfunded termination liability. This approach mitigates the major administrative and cost problems posed by a determination of net worth as well as the possible incentive for termination in the event that termination were more

¹⁶In order to assure that benefits are protected under this option, reorganization and PBGC financial assistance for insolvent reorganized plans would be necessary.

¹⁷See Erisa § 4062 (b).

Nos. 83-245, 83-291

Office - Supreme Court, U.S.

FILED

DEC 12 1983

ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

[List of Counsel on Inside Cover]

**JURISDICTIONAL STATEMENTS FILED
AUGUST 15, 1983 (No. 83-245) AND
AUGUST 19, 1983 (No. 83-291)
PROBABLE JURISDICTION NOTED OCTOBER 17, 1983**

HENRY ROSE

General Counsel

BARUCH A. FELLNER

Associate General Counsel

J. STEPHEN CAFLISCH

Special Counsel

PETER H. GOULD

TERENCE G. CRAIG

DAVID F. POWER

DEBRA N. DIENER

Attorneys

PENSION BENEFIT GUARANTY

CORPORATION

2020 K Street, N.W.

Washington, D.C. 20006

(202) 254-8298

Of Counsel:

NATHAN LEWIN

MILLER, CASSIDY, LARROCA &
LEWIN

2555 M Street, N.W.

Washington, D.C. 20037

(202) 293-6400

COUNSEL FOR APPELLANT

PENSION BENEFIT

GUARANTY CORPORATION

THOMAS M. TRIPLETT

MILDRED J. CARMACK

SCHWABE, WILLIAMSON,

WYATT, MOORE & ROBERTS

1200 Standard Plaza

1100 S.W. Sixth Avenue

Portland, Oregon 97204

(503) 222-9981

COUNSEL FOR APPELLEE

WILLIAM B. CROW

JAMES N. WESTWOOD

WILLIAM H. WALTERS

MILLER, NASH, WIENER,

HAGER & CARLSEN

111 S.W. Fifth Avenue

Portland, Oregon 97204

(503) 224-5858

DAVID S. PAULL

PAULL & BARNETT

5441 S.W. Macadam Ave.

Portland, Oregon 97201

COUNSEL FOR APPELLANT

OREGON-WASHINGTON

CARPENTERS-EMPLOYERS

PENSION TRUST FUND

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES ---

1981

- September 29 Filed Complaint, Plaintiff R.A. Gray & Co.'s Application for Preliminary Injunction and for Order to Show Cause, and supporting points and authorities
- October 6 Filed Gray's Motion for Expedited Hearing and/or Application for Temporary Restraining Order
- October 23 Filed Defendant Oregon-Washington Carpenters-Employers Pension Trust Fund's Motion for Summary Judgment and Supporting Affidavit and Memorandum
- October 23 Filed Gray's Memorandum in Support of Temporary Restraining Order and Preliminary Injunction and Affidavit of John R. Bentley With Exhibits
- November 2 Filed Defendant Pension Benefit Guaranty Corporation's Motion to Accept Late-Filed Brief, with supporting points and authorities, and Statement of Reasons and Authorities of Defendant Pension Benefit Guaranty Corporation in Opposition to Gray's Preliminary Motions
- November 6 Filed Gray's Motion for Summary Judgment
- November 16 Record of Hearing on Motion for Preliminary Injunction and Motions for Summary Judgment
- November 16 Enter Order denying Gray's Motion for Preliminary Injunction, opinion forthcoming
- November 19 Filed Gray's Motion for Reconsideration
- November 20 Enter Order Denying Gray's Motion for Reconsideration

(IV)

December 1	Enter Memorandum Opinion and Order Denying Gray's Motion for Preliminary Injunction
December 4	Filed Answer of PBGC
1982	
April 7	Filed Affidavit of Thomas M. Triplett with Exhibits
April 16	Filed Motion of PBGC for Summary Judgment and Memorandum of Points and Authorities in Support of PBGC's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment
July 7	Record of Hearing on Motions for Summary Judgment
August 11	Enter Memorandum Opinion and Order Granting PBGC's and Trust Fund's Motions for Summary Judgment and Denying Gray's Motion for Summary Judgment
August 12	Enter Judgment Granting Defendants' Motions for Summary Judgment and Dismissing Action
September 10	Filed Gray's Notice of Appeal
1983	
May 20	Filed Opinion of Court of Appeals
May 20	Filed Judgment of Court of Appeals
June 15	Filed PBGC's Notice of Appeal to the Supreme Court of the United States
June 20	Filed Trust Fund's Notice of Appeal to the Supreme Court of the United States
August 15	Filed PBGC's Jurisdictional Statement (No. 83-245)
August 19	Filed Trust Fund's Jurisdictional Statement (No. 83-291)
October 17	Probable Jurisdiction Noted

[Names of Counsel Omitted in Printing]
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 81-912-RE

R. A. GRAY & Co., PLAINTIFF,

v.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION
TRUST FUND AND PENSION BENEFIT GUARANTY CORPORATION,
DEFENDANTS

COMPLAINT FOR DECLARATORY
JUDGMENT AND OTHER RELIEF

I.

JURISDICTION

This action arises under the U.S. Const. art. I, § 9 and U.S. Const. amend. V and VII, and also under the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, both as more fully alleged below.

This court has jurisdiction under 28 U.S.C. §§ 1331 [2] and 1337 and under 29 U.S.C. §§ 1305(f) and 1451(a)(1). The amount in controversy, exclusive of interest and costs, exceeds \$10,000.00.

II.

PARTIES

Plaintiff R. A. Gray & Co. ("Gray") is a corporation organized under the laws of the state of Oregon and was, at all times material hereto, a signatory of successive bargaining agreements with the Oregon Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, and constituent locals thereof ("the Union"), and has been, as provided by the terms of those agreements, a contributor to a multiemployer plan ("the Plan") within the meaning of 29 U.S.C. § 1002(37).

Defendant Oregon-Washington Carpenters-Employers Pension Trust Fund ("the Trust") is a trust organized under the laws of the State of Oregon and the United States, and is the plan sponsor which administers the Plan.

Defendant Pension Benefit Guaranty Corporation ("the Corporation") is a body corporate, established by 29 U.S.C. § 1302, and charged by law with the implementation and enforcement of ERISA, as amended by MPPAA.

III.

CLAIM FOR RELIEF AGAINST THE TRUST

1. Since 1965 plaintiff Gray has contributed to the Trust a total of \$398,095.56 in accordance with the provisions [3] of successive collective bargaining agreements with the Union which were in force during that time.

2. Each of those collective bargaining agreements was executed prior to April 29, 1980.

3. Under those collective bargaining agreements and the terms of the Plan Gray's sole financial obligation to the Trust was to make the contributions therein provided for. Gray has made those contributions as alleged in Paragraph III(1).

4. On February 14, 1980, Gray gave notice of termination of its collective bargaining agreement, effective June 1, 1980, to the Union and thereafter sought to negotiate a successor agreement.

5. On June 1, 1980 the Union instituted a strike of Gray's business and has continued to picket or strike Gray's premises since that time.

6. On September 26, 1980, Congress enacted MPPAA, purporting to impose new financial liabilities on employers who withdrew from multiemployer plans after April 29, 1980, but not imposing comparable liabilities on employers who are parties to other kinds of plans authorized by ERISA.

7. On July 24, 1981 the Trust notified Gray that it believed Gray withdrew completely from the plan on June 1, 1980, and that it has assessed against Gray a withdrawal liability in the net amount of \$201,359.00 pursuant to the provisions of ERISA as amended by MPPAA. Gray denies

that it has withdrawn from the plan within the meaning of 29 U.S.C. §§ 1383 and [4] 1398(2).

8. The Trust has also notified Gray that unless the first quarterly payment on that assessment is received within 120 days of July 24, 1981 the Trust will invoke penalties for default as authorized by 29 U.S.C. § 1399.

9. Under the provision of 29 U.S.C. §§ 1451 and 1132(g)(2) a penalty may be imposed for default in payment of withdrawal liability.

10. If plaintiff Gray disputes the trust's determination that Gray is subject to withdrawal liability or the amount of that liability Gray must, under the provisions of 29 U.S.C. § 1401, submit to arbitration in which the arbitrator's findings will be presumptively correct and can be rebutted, on review, only by a clear preponderance of the evidence. If Gray does not submit to arbitration the Trust's assessment will, under the provisions of 29 U.S.C. § 1401(b)(1), be due and payable according to its terms and enforceable by action in which Gray cannot dispute the assessment.

11. Unless restrained, the Trust will continue to assert Gray's liability for withdrawal from the plan and will proceed to attempt to collect its assessment in the manner provided in MPPAA, to Gray's damage.

12. By reason of the foregoing, if the Trust is allowed to enforce the withdrawal liability it has purported to assess, the provisions of MPPAA as they affect Gray will:

a. Impair the provisions of the collective [5] bargaining agreements and the Plan to which Gray was a party and deprive Gray of its property without due process of law in violation of U.S. Const. amend. V.

b. Arbitrarily impose retroactive liability on plaintiff Gray for actions and events which occurred before the enactment of MPPAA in violation of U.S. Const. amend. V.

c. Compel Gray to submit any dispute as to the fact or the amount of that liability to arbitration, thus depriving Gray of the right to a jury trial in violation of U.S. Const. amend. V and VII.

d. Arbitrarily impose on Gray a liability which is disproportionate to that imposed on employers who contribute

to other kinds of plans in violation of U.S. Const. amend. V.

e. Authorize the imposition of penalties on Gray based on events which occurred before the enactment of MPPAA in violation of U.S. Const. art. I, § 9.

IV.

CLAIM FOR RELIEF AGAINST THE CORPORATION

1. Plaintiff Gray realleges, and incorporates here by reference, all of the allegations of Paragraph III above.

2. The Corporation is the body charged by Congress with implementation of ERISA as amended by MPPAA and has announced its intention to formulate and promulgate regulations to facilitate and carry out the assessment and collection of [6] withdrawal liabilities and has proceeded to adopt certain regulations according to its announced intention.

3. Unless Gray is granted the relief requested in this proceeding, the corporation will proceed with plans to implement and facilitate, by advice and regulation, the assessment and enforcement of withdrawal liabilities against Gray and others similarly situated who withdrew, or purportedly withdrew, from multiemployer plans prior to the enactment of MPPAA.

PRAYER

WHEREFORE plaintiff Gray prays for a judgment and decree as follows:

1. Temporarily, preliminarily and permanently enjoining the Trust from collecting or taking any steps provided for in ERISA, as amended by MPPAA, toward collecting the purported withdrawal liability which it has claimed to assess against Gray; and

2. Declaring the withdrawal liability provisions of MPPAA to be invalid and unenforceable against employers who are parties to multiemployer plans under contracts executed before the effective date of those provisions which contracts do not provide for such liabilities; or

3. As an alternative to the relief requested in Paragraph 2 of the Prayer, declaring the withdrawal liability provisions of MPPAA to be invalid and unenforceable against em-

ployers who withdrew from such multiemployer plans prior to the date those provisions were enacted;

[7] 4. Declaring the compulsory arbitration provisions of MPPAA to be invalid and unenforceable as to employers who have not consented to submit the disputes therein provided for to arbitration; and

5. Declaring the penalty provisions of the said law to be in contravention of U.S. Const., art. I, § 9.

6. Awarding to plaintiff its costs and expenses, including reasonable attorney fees, incurred in this action.

7. Granting such additional and further relief as may be appropriate to declare and protect plaintiff's rights.

By: /s/ Thomas M. Triplett

THOMAS M. TRIPLETT
of Attorneys for Plaintiff
R. A. Gray & Co.

**MEMORANDUM IN SUPPORT OF DEFENDANT TRUST
FUND'S MOTION FOR SUMMARY JUDGMENT**

[Caption Omitted in Printing]

* * *

[2] B. Statement of Facts.

Plaintiff is an Oregon corporation which formerly was a party to collective bargaining agreements with the Oregon Council of Carpenters, United Brotherhood of Carpenters and Joiners of America and constituent locals thereof. Pursuant to the terms of these collective bargaining agreements, Plaintiff contributed to the Oregon-Washington Carpenters-Employers Pension Trust Fund, a defendant herein (hereinafter "Trust [3] Fund"), on behalf of its employees employed in the bargaining unit covered by the collective bargaining agreements. The assets of the Trust Fund are held by the trustees thereof for the purpose of providing retirement and related benefits in accordance with the provisions of the plan adopted pursuant to the Trust ("Plan").

The Trust Fund is an employee benefit plan to which more than one employer is required to contribute and which is maintained pursuant to more than one collective bargaining agreement and is therefore a multiemployer pension plan within the meaning of MEPPAA, 29 USC § 1301. The Plan primarily covers employees in the building and construction industry and it is believed that substantially all the employees on whom Plaintiff contributed worked in the building and construction industry. See 29 USC § 1383(b)(1).

On or about February 14, 1980, Plaintiff gave notice of termination of its collective bargaining agreement, effective June 1, 1980, and has withdrawn from the Plan within the meaning of 29 USC § 1383.

The trustees notified Plaintiff of its withdrawal liability and demanded payment in accordance with a schedule of payments which was provided along with said notice. (The notice and schedule of payments are attached as Exhibit B to the Affidavit of Dolores Taylor filed in support of this Motion for Summary Judgment.)

[4] Plaintiff has requested that the trustees review some eight matters in connection with the demand. See 29 USC § 1399(b)(2). Plaintiff has made no payments of its withdrawal liability and is delinquent. See 29 USC § 1399(c)(4). Plaintiff was notified of the delinquency and that it will be in default if the delinquent payment and interest are not paid within 60 days after receipt of that notice. See 29 USC § 1399(c)(5).

* * *

**AFFIDAVIT IN SUPPORT OF DEFENDANT TRUST
FUND'S MOTION FOR SUMMARY JUDGMENT**

[Caption Omitted in Printing]

STATE OF OREGON)
) SS
COUNTY OF MULTNOMAH)

I, DOLORES TAYLOR, the trust administrative officer for United States National Bank of Oregon, fund manager for the Oregon-Washington Carpenters-Employers Pension Trust Fund, being first duly sworn, depose and say:

[2] That, on July 24, 1981, on behalf of the Board of Trustees, I had deposited in the United States Post Office at Portland, Oregon, addressed to:

R. A. Gray & Co.
P. O. Box 23516
Tigard, Oregon 97223

the attached notice of withdrawal liability and demand for payment dated July 24, 1981, together with the attached schedule of payments.

/s/ [Dolores Taylor] _____

DOLORES TAYLOR

SUBSCRIBED and sworn to before me this 22nd day of October, 1981.

/s/ _____

Notary Public for Oregon

My commission expires: Aug. 3, 1984

[3] OREGON-WASHINGTON CARPENTERS-EMPLOYERS
TRUST FUNDS

ADMINISTRATOR • TRUST DEPARTMENT, U.S. NATIONAL BANK OF OREGON
321 S.W. SIXTH AVENUE P.O. BOX 3168 PORTLAND, OREGON 97208 • PHONE 225-6111

July 24, 1981

R. A. Gray & Co.
P. O. Box 23516
Tigard, Oregon 97223

Subject: Notice of Withdrawal Liability and Demand
for Payment

Gentlemen:

By reason of the cessation of your Master Labor Agreement obligation to contribute to the Oregon-Washington Carpenters-Employers Pension Trust Fund and your continuation of work in the jurisdiction of the Master Labor Agreement of the type for which contributions were previously required, you had a complete withdrawal from the Pension Trust Fund on June 1, 1980.

The total amount of your withdrawal liability, pursuant to Section 4211(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is \$201,305 [sic]. That liability was computed as follows and is further described in Exhibit I hereto:

Unfunded vested benefits 6-30-79	×	Withdrawing employer contributions required 7-1-74 thru 6-30-79	=	Withdrawal liability
		<u>All employer contributions made 7-1-74 thru 6-30-79 excluding substantial withdrawn employers</u>		

\$27,254,900	×	\$ 242,448*	=	\$201,359
		<u>\$32,818,093</u>		

*Quotient rounded to four decimal places.

[4] Exhibit I also contains the payment schedule for that liability. The Board of Trustees hereby demands payment of the foregoing withdrawal liability amount in accordance with Exhibit I and this letter. The initial withdrawal liability payment must be made no later than 60 days after the date of

demand. Subsequent, quarterly payments must be made by January 1, April 1, July 1 and October 1 of each year with the final payment made by October 1, 1984. You may prepay all or any part of the annual withdrawal liability payments plus accrued interest without penalty.

ERISA Section 4219(c)(5) provides that should you fail to make any payment when due and do not cure such failure within 60 days after notice by the Fund, you will be in default. In the event of default, the Trustees require full payment of all unpaid amounts, together with interest from the due date of the first payment not timely made at rates based on prevailing market rates in accordance with federal regulations.

Within 90 days from the date you receive this notice, you may:

- (A) Ask the Board of Trustees to review any specific matter relating to the determination of your liability and the schedule of payments;
- (B) Identify to the Board of Trustees any inaccuracy in your withdrawal liability; and
- (C) Furnish the Board of Trustees with any additional relevant information.

See ERISA Section 4219(b) regarding this procedure.

You are required by ERISA to make the quarterly payments, notwithstanding any request for review or appeal of the determination of the amount of your liability or the schedule of payments.

For your information, the foregoing withdrawal liability determination is based on the adoption of the following rules by Plan amendment:

1. In determining the denominator of the withdrawal liability fraction, the Board of Trustees adopted the Pension Benefit Guaranty Corporation option of excluding only the contributions of significant withdrawn employers who have previously withdrawn, namely those contributing the lesser of \$250,000 or 1 percent in any of the relevant years.

- [5] 2. Employer contributions received in July and delinquent employer contributions received in August

of each calendar year are allocated to the prior July 1 through June 30 plan year.

3. The annual withdrawal liability payment is determined using employer contribution base units (covered hours) in the five-year period ending June 30, 1979.

Very truly yours,

/s/ Dolores M. Taylor

DOLORES M. TAYLOR

cc: Co-Legal Counsel

[6]

EXHIBIT I**WITHDRAWN EMPLOYER R. A. GRAY & CO.****A. Summary of Withdrawal Liability Calculation**

1. Date Participation Ceased	June 1, 1980
2. Total Contributions of Withdrawn Employer to the Plan, for 5 Fiscal Year Period Ended June 30, 1979	\$ 242,448
3. Total Contributions of All Participating Employers for 5 Fiscal years Period Ended June 30, 1979	\$32,818,093
4. Contributions as Percentage of Total Contributions	0.7388%
5. Total Withdrawal Liability of Plan as of June 30, 1979	\$27,254,900
6. Withdrawal Liability of Withdrawn Employer—equals (4) times (5)	\$ 201,359
7. De minimus Amount	\$ -0-
8. Net Withdrawal Liability of Withdrawn Employer	\$ 201,359

B. Calculation of Required Annual Payments

1. Average Annual Contribution Base (Hours)	65,410
2. Highest Contribution Rate Prior to Withdrawal	\$1.00
3. Required Annual Payment—equal (1) times (2)	\$ 65,410

C. Payment Schedule:

\$16,353 per quarter for 13 quarters plus a final payment of \$11,885.

[Caption Omitted in Printing]

I, JOHN R. BENTLEY, being first duly sworn, depose and say:

R. A. Gray & Co. is an Oregon corporation. It is engaged in business as a building and construction contractor. It has been engaged in this activity since 1964.

On February 14, 1980, notice of termination was given. A copy of said notice is attached hereto, marked Exhibit 2. The Collective Bargaining Agreement terminated on May 31, 1980. No new Agreement has been executed between the parties.

Approximately 63% of the Carpenters working for R. A. Gray prior to the commencement of the strike are now working for it. Approximately 37% have left the employ of R. A. Gray. I am advised that the majority of these have found work with other employers who contribute to the Oregon-Washington Carpenters Employers Pension Trust Fund.

R. A. Gray & Co. has a Pension Plan and a Profit Sharing Plan, copies of which are attached, marked as Exhibits 3 and 4 respectively. The Profit Sharing Plan applies to all employees. It preexisted the commencement of the labor dispute with the Union. The Pension Plan was established thereafter and applies to all employees unless they are covered under a Collective Bargaining Agreement. It [3] therefore applies to each employee performing work falling within the jurisdictional claims of the Union.

As a general contractor, it is necessary for R. A. Gray to analyze each of its costs in anticipation of bidding upon a project. Some of its more significant costs are those which relate to labor. In bidding R. A. Gray necessarily factored into its bidding considerations the contractually defined cost of its pension contributions. It did not, and it could not factor in, withdrawal liability since none existed prior to September, 1980.

Had such liability been known to exist, R. A. Gray would have considered the following alternatives:

1. Negotiate a collective bargaining agreement with the Union which involved a single employer as opposed to a multiemployer pension plan;

2. Termination of its Collective Bargaining Agreement; or

3. Include in its bids a cost factor against withdrawal liability.

Attached, marked Exhibits 5 and 6, are the demand and notice of default letters sent by the Oregon-Washington Carpenters Employees [sic] Trust Fund. Under the terms of these letters, unless a payment is made by November 22, 1981, R. A. Gray will be declared in default and the sum of \$201,359.00 will become immediately payable, together with interest, liquidated damages and attorney's fees for failure to pay.

Since 1965 the total contributions of R. A. Gray on behalf of employees performing work falling within the jurisdiction of the Union is \$398,095.00, \$237,000.00 of which was paid in the five years [4] immediately preceding.

If R. A. Gray is required to pay the sums set forth in the demand and notice of intent, the following consequences could well result:

1. R. A. Gray would be deprived of profitability in the next two years and therefore employees would not receive a share of profit under the terms of the Profit Sharing Plan.

2. R.A. Gray's balance sheet would be adjusted by \$200,000.00 with the attendant and necessary impact that such adjustment may have on its bonding capacity and ability to bid projects which require bonds.

3. Place cash flow of R. A. Gray & Co. in a condition which requires borrowing at interest rates between 18% and 20% annually.

3. [sic] Plans for expansion of business would have to be modified or shelved.

5. Contractors without withdrawal liability would be placed in a favored position for future bidding.

In consequence of the above, I believe that R. A. Gray and its employees would be irreparably harmed if required to pay as set forth in the demand and notice of intent.

Finally, I am attaching a letter furnished to me pertaining to an employer facing a similar plight, marked Exhibit 7.

/s/ _____

SUBSCRIBED AND SWORN TO BEFORE ME THIS 22ND DAY OF OCTOBER, 1981.

/s/ _____

NOTARY PUBLIC FOR OREGON
MY COMMISSION EXPIRES: 3/14/84

[5] [EXHIBIT ONE TO AFFIDAVIT OF
JOHN R. BENTLEY]

**CARPENTERS' SHORT FORM AGREEMENT
OREGON AND SOUTHWEST WASHINGTON**

THIS AGREEMENT, Made and Entered Into this 23 day of July, 1968 by and between R. A. Gray & Co. (hereinafter called the EMPLOYER) and Oregon State Council of Carpenters, Portland and Vicinity District Council, S.W. Washington District Council, Piledrivers and Millwrights of the United Brotherhood of Carpenters and Joiners of America (hereinafter called the UNION), shall be in full force and effect from the date herein above set forth to and including May 31, 1971, and shall be automatically renewed from year to year thereafter unless either party shall give at least sixty (60) days written notice to the other party prior to May 31, 1971 or any subsequent May 31st.

The terms, conditions and coverage of the Carpenters' Labor Agreement, including any subsequent modifications are hereby adopted and made a part hereof by reference as though fully herein set forth between the Union and the Employer Association dated April 30, 1965, and subsequently amended and effective May 1, 1968.

The Employer shall report and shall make the Health & Welfare, Pension, Apprenticeship and Vacation contributions provided in said carpenters' Labor Agreement. The Employer further approves and adopts the agreements and declarations of trusts currently in force between the Union and the aforesaid Employer Associations, and further designates the trustees appointed by the aforesaid Employer Associations as his representatives in the administration of said trust funds.

UNION:

**OREGON STATE COUNCIL
OF CARPENTERS**

By _____/s/

Executive Secretary

_____/s/

Authorized Signature

EMPLOYER:

R. A. Gray & Co. _____

Address P.O. Box 23567 _____

Town: Tigard, Oregon _____

Telephone No. 639-6127 _____

(Receipt of copy
acknowledged)

/s/ _____

Authorized Signature

● ● ●

[7] CARPENTERS
MASTER
LABOR AGREEMENT

THIS AGREEMENT, made and entered into this first day of June, 1973, and as amended 6/1/75 for the period 6/1/75-5/31/80.

BETWEEN

**OREGON-COLUMBIA CHAPTER,
THE ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.**

AND

OREGON STATE COUNCIL
SOUTHWEST WASHINGTON DISTRICT COUNCIL

OF THE

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

[UNION SEAL OMITTED IN PRINTING]

[13] ARTICLE XV
PENSION

Section 1. In addition to the wage scales listed in Schedules "A" herein, all persons, parties, firms or corporations as listed in Schedule "B," or otherwise coming under the scope of this Agreement, who are, or may become signatory parties to this Agreement, agree that the existing Pension Trust Fund as established July 1, 1962, shall continue in full force and effect for the purpose of providing Pension benefits for all eligible employees covered by this Agreement, and shall pay into the existing Oregon-Washington Carpenters-Employers Pension Trust Fund the sum of forty cents (40¢) per compensable man-hour effective June 1, 1973, and the sum of sixty-five cents (65¢) per compensable man-hour effective June 1, 1974. Such payments shall be made monthly in accordance with the requirements of the Trust Agreement and all applicable provisions of the existing Trust Agreement shall continue in full force and effect.

fect. The fund established by prior contributions shall be recognized as a fund held in trust, and therefore an appropriate depository [sic] for the contributions referred to herein above.

Section 2. It shall be a violation of this Agreement for the Union to allow workmen covered by this Agreement to work for an employer who fails, after due notice, to make the proper contributions to the Pension Fund in accordance with the provisions of this Agreement.

Section 3. In the event an employer fails to make the monetary contributions in conformity with this Article of the Agreement, the Union is free to take any economic action against such employer it deems necessary, and such action shall not be considered a violation of this Agreement.

* * *

[20] [EXHIBIT TWO TO AFFIDAVIT OF
JOHN R. BENTLEY]

February 14, 1980

Oregon State Council of Carpenters
United Brotherhood of Carpenters & Joiners of America
411 N.E. 12th Avenue, Room 105
Portland, Oregon 97232

Gentlemen:

Pursuant to Article III, Section 2 of the collective bargaining agreement, R.A. Gray & Co. exercises its right to terminate the collective bargaining agreement with the Oregon State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, and/or its affiliated locals.

Yours truly,

J.R. Bentley /s/
Secretary-Treasurer

CC: Federal Mediation & Conciliation Service
Employment Relations Board, Conciliation Service
Division
Mr. Thomas M. Triplett; Schwabe, Williamson, Wyatt,
Moore & Roberts
District Council of Carpenters, Portland, OR

[CERTIFIED MAIL RECEIPTS OMITTED IN PRINTING]

[34]

[EXHIBIT SIX TO AFFIDAVIT OF JOHN R. BENTLEY]

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
TRUST FUNDS

Fund Manager • Trust Group, U.S. National Bank of Oregon
309 S.W. Sixth Avenue, P.O. Box 3168, Portland, Oregon 97208 • Phone 225-5675

September 25, 1981

R.A. Gray & Co.
P.O. Box 23516
Tigard, Oregon 97223

Subject: Delinquent Withdrawal Liability
Payment

Dear Sirs:

Your quarterly withdrawal liability payment due within 60 days of the July 24, 1981, demand has not been received and is *delinquent*.

Interest accrues on your delinquent payment based on prevailing market rates for comparable obligations in accordance with Pension Benefit Guaranty Corporation regulations which have not yet been issued. Absent contrary regulations, interest accrues on your delinquent payment in the amount of \$8.74 a day from the initial due date through the date the delinquent withdrawal liability payment and accumulated interest is received by the Trust Office.

If that quarterly payment, together with interest, is not received within 60 days after your receipt of this letter, your withdrawal liability payment will be in default. In the event of a default, the Board of Trustees hereby demands immediate payment of the entire balance of your withdrawal liability, \$201,359, plus interest on that amount from the due date of the first quarterly payment that was not timely made.

Yours very truly,
Dolores H. Taylor

cc: Co-Legal Counsel
Mr. Thomas M. Triplett
Certified Mail # 124483

**STATEMENT OF REASONS AND AUTHORITIES OF
DEFENDANT PENSION BENEFIT GUARANTY
CORPORATION IN OPPOSITION TO PLAINTIFF R.A.
GRAY & CO.'S MOTIONS FOR TEMPORARY
RESTRAINING ORDER, PRELIMINARY INJUNCTION,
ORDER THAT NOTICE OF LIABILITY BE WITHDRAWN
AND ORDER THAT NOTICE OF DELINQUENCY BE
NULLIFIED**

[CAPTION OMITTED IN PRINTING]

Preliminary Statement

Defendant, Pension Benefit Guaranty Corporation (the "PBGC"), is a wholly-owned United States Government corporation created by Section 4002(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by* the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), 29 U.S.C.A. §1302(a) (Supp. 1981). The PBGC was created to administer the pension plan termination insurance program established by Title IV of ERISA, 29 U.S.C. §§1301-1382 (1976). The PBGC shares the responsibility for enforcing the mandatory multiemployer pension plan withdrawal [2] liability and insolvency insurance program added by the 1980 amendments to Title IV of ERISA, 29 U.S.C.A. §§1301-1461, 1303(a), 1303(e)(1) (Supp. 1981).¹

Plaintiff R.A. Gray & Co. ("Gray") is an Oregon corporation which has entered into successive collective bargaining agreements with the Oregon State Council of Carpenters (affiliated with United Brotherhood of Carpenters & Joiners of America) (the "Union").

Defendant Oregon-Washington Carpenters-Employers Trust Fund (the "Trust") is a trust organized under the laws of the United States and the state of Oregon. The Trust is administered pursuant to the Revised Pension Plan

¹ The factual averments which follow are based upon the complaint and its supporting documents. For purposes of this pleading, the PBGC will accept the recited facts as true, reserving the right at subsequent stages of this case to conduct discovery and develop a complete record with regard to these and other factual allegations.

for the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Plan"), which is a multiemployer defined benefit pension plan within the meaning of Section 4001(a)(3) of ERISA, 29 U.S.C.A. §1301(a)(3) (Supp. 1981). The trustees of the Trust are the plan sponsor of the Plan within the meaning of Section 4001(a)(10) of ERISA, 29 U.S.C.A. §1301(a)(10) (Supp. 1981). Gray made contributions to the Trust in accordance with Gray's collective bargaining agreements with the Union.

On or about February 14, 1980, Gray notified the Union that, effective June 1, 1980, Gray was terminating its collective bargaining agreement with the Union. On or about June 1, 1980, the Union began a strike against Gray, which allegedly continues to the present.

On or about July 24, 1981, the trustees of the Trust notified Gray, pursuant to Sections 4202(2), and 4219(b)(1)(A) of ERISA, 29 U.S.C.A. §§1382(2), 1399(b)(1)(A) (Supp. 1981), [3] that Gray was liable to the Plan, pursuant to Section 4201 of ERISA, 29 U.S.C.A. §1381 (Supp. 1981), and demanded payment of a withdrawal liability of \$201,359. Exhibit 1. The notice of liability stated that Gray ceased to have an obligation to contribute to the Trust on or about June 1, 1980, and consequently withdrew from the Plan in a complete withdrawal as defined in Section 4203 of ERISA, 29 U.S.C.A. §1383. In a letter to the Plan administrator dated August 6, 1981, Gray's counsel raised several questions regarding Plan rules and amendments adopted pursuant to the Multi-employer Act, and requested copies of actuarial reports and other information needed to permit Gray to compute its withdrawal liability. Exhibit 2. Some of the questions were prompted by the fact that a new single-employer pension plan covering Gray's employees had been or would soon be established as a substitute for the Plan. By letter dated September 3, 1981, counsel for the Trust supplied some of the documents and information requested, and made the actuarial reports available for inspection. Exhibit 3. Gray's counsel replied in a letter dated September 10, 1981, inviting the Trust to "declare a moratorium on enforcement," or alternatively to join Gray in suing the PBGC, asserting the

Multiemployer Act is unconstitutional. Exhibit 4. In a letter dated September 16, 1981, the Trust's counsel declined the invitation to join with Gray in contesting the Multiemployer Act, stated they would not recommend a "moratorium" on the collection of Gray's liability, and provided copies of the actuarial valuations of the Trust. Exhibit 5.

Subsequently, in a letter dated September 25, 1981, the Plan Administrator notified Gray of the delinquency of its quarterly payment of withdrawal liability, and that Gray would be in default if it did not cure its failure to pay within 60 days. Exhibit 6.

[4] On September 29, 1981, Gray filed its complaint and its Application of Plaintiff for Preliminary Injunction and for Order to Show Cause. On October 6, 1981, Gray filed its Motion of Plaintiff for Expedited Hearing and/or Application of Plaintiff for Temporary Restraining Order. On October 7, 1981, this court set a hearing for October 16, 1981, on both the Motion for a Temporary Restraining Order and the Motion for a Preliminary Injunction. The hearing date was later changed to November 4, 1981, then reset for November 16, 1981, in order to hear the Plan's motion for summary judgment (filed October 23 and which, as of this filing, has not been received by the PBGC) as well as Gray's motion for preliminary injunction. In a minute order, the court requested counsel to advise the court whether the hearing could be consolidated with the trial on the merits. In a letter to the court, the PBGC has respectfully requested that the court not consolidate the trial on the merits with the hearing on the preliminary injunction.

In the complaint, Gray denied that it has withdrawn from the Plan and alleged that the Multiemployer Act is unconstitutional. The PBGC denies all of the allegations of irreparable injury and unconstitutionality pleaded in Gray's complaint. In addition, as discussed *infra*, the PBGC believes that further facts must be developed to determine whether plaintiff has withdrawn from the Plan—an issue properly left for arbitration under the Multiemployer Act. Accordingly, pursuant to Rule 11(b) of the Local Rules of the

United States District Court for the District of Oregon, the PBGC opposes Gray's motions for equitable relief pending a trial of the merits, and files this Statement of Reasons and Authorities in support of its opposition.

* * *

[21] [EXHIBIT TWO TO STATEMENT OF REASONS
AND AUTHORITIES OF PBGC]

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS
ATTORNEYS AT LAW
1200 STANDARD PLAZA
1100 S.W. 6TH AVENUE
PORTLAND, OREGON 97204
TELEPHONE (503) 222-9981

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

August 6, 1981

Ms. Dolores H. Taylor
Oregon-Washington Carpenters-
Employers Trust Funds
Administrator
U.S. National Bank of Oregon
P.O. Box 3168
Portland, Oregon 97208

Re: R.A. Gray & Co.

Dear Ms. Taylor:

Your letter of July 24, 1981, directed to R.A. Gray, has been referred to the undersigned for response. The contents of your letter raised a number of serious questions to which response is requested. The questions include the following:

1. Section 4218 of Public Law 96-364 provides that withdrawal does not occur when

"* * * an employer suspends contributions under the Plan during a labor dispute involving its employees."

Commencing on June 1, the Oregon State Council of Carpenters and its constituent locals struck R.A. Gray. They have picketed intermittently since that time. I would appreciate being advised as to what information the Trust had when it concluded that the "labor dispute" has terminated and therefore that Section 4218 (2) is no longer operative.

2. It is apparent that the Trust has adopted a series of amendments pursuant to the provisions of Public Law

96-364. We would request copies of those amendments together with the current provisions of the Plan.

[22] 3. We would request copies of the last three actuarial reports to the Trust.

4. We would request that the Plan sponsor, pursuant to Section 4221 (e), furnish general information necessary from which R.A. Gray can compute its withdrawal liability. We would interpret this request to encompass furnishing complete information with respect to determination of the total withdrawal liability of the Plan as of June 30, 1979.

5. We would request information pertaining to the rules that the Plan has adopted with respect to transfer from a multiemployer plan to a single employer plan. It may well be that a request will be made for transfer of assets and/or liabilities.

6. We would request information from the actuary to determine what safeguards or steps have been taken to assure that the total fund of withdrawal liability does not include ineligible employees, i.e., supervisors or other exempt personnel, so as to inappropriately increase the amount of unfunded withdrawal liability.

Finally, we would request that you furnish this information promptly. As you have correctly pointed out, the time within which a request for review can be made is brief and therefore your prompt response is absolutely mandatory. Your prompt reply would be greatly appreciated.

Very truly yours

THOMAS M. TRIPLETT

TMT/baw

cc: Mr. John Bentley
R.A. Gray & Co.

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

[23] [EXHIBIT THREE TO STATEMENT OF REASONS
AND AUTHORITIES OF PBCG]

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
TRUST FUNDS

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

RECEIVED
SEP 5 1981
MILLER, NASH, YERKE,
WIENER & HAGER

September 3, 1981

Mr. Thomas M. Triplett
Attorney at Law
1100 S.W. Sixth Avenue
Portland, Oregon 97204

Subject: Oregon-Washington Carpenters-Employers
Pension Trust Fund

R.A. Gray & Co.

Dear Mr. Triplett:

We are co-legal counsel for the subject Trust Fund. Your August 6, 1981, letter to the Fund Manager regarding R.A. Gray & Co. ("Gray") was referred to us for a response. The Trust Fund's response to the six matters referred to in your letter is set forth below.

Labor Dispute. When the Board of Trustees had the July 24, 1981, letter sent to Gray, no assertion had been made to the Board that Gray's termination of its collective bargaining agreement was because of a "labor dispute" within the meaning of Section 4218 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In any event, that section provides that:

"An employer shall not be considered to have withdrawn from a plan *solely because* — * * * an employer suspends contribution under the plan during a labor dispute involving its employees." (Emphasis added)

Even if a "labor dispute" exists with respect to Gray, its cessation of contributions resulted from cessation of its labor agreement obligation to contribute. That cessation has continued for some 15 months and appears to constitute

[24] something more than a "suspension of contributions" under ERISA Section 4218(2). Even if a "suspension of contributions" exists, it is doubtful that Gray's withdrawal was "solely because" of a "labor dispute" as those terms are used in that section. For your information, section 4218 as referenced in your letter is not a section of Public Law 96-364, the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"), but is a section of ERISA, Public Law 93-406, added by the Multiemployer Act.

Plan Amendments. We enclose a copy of the Trust Pension Plan Sixth Amendment which includes the Multiemployer Act changes.

Actuarial Valuations. You requested copies of the last three Trust Fund actuarial reports. Presumably, you mean the last three actuarial valuations. Those valuations and the copying charge (\$.10 per page) for each is as follows:

Actuarial valuation	
as of June 30, 1978	\$4.00
Actuarial valuation	
as of June 30, 1979	\$4.00
Actuarial valuation	
as of June 30, 1980	\$4.90

You may review those valuations at no charge by arranging a mutually convenient time with the Fund Manager.

Plan Unfunded Vested Benefits. You requested general information pursuant to ERISA Section 4221(e) from which Gray can compute its withdrawal liability. By July 24, 1981, demand letter to Gray, the Trust Fund provided Gray with the completed statutory formula used to compute its withdrawal liability. Martin E. Segal Company is the Trust Fund consultant and actuary. Segal has made the actuarial determinations involved and your letter was forwarded to them for review and comment. Their letter of August 26, 1981, is enclosed herewith.

Asset Transfer Rules. To date, the Trust Fund has not adopted any rules pursuant to ERISA Section 4234(a) regarding the transfer of assets from the Plan in connection with the transfer of Plan liabilities to a single-employer plan. No requests for any such transfer have been made to

date. Any such transfer must comply with ERISA Section 4232.

[25] *Ineligible Employees.* You requested information regarding the safeguards or steps that have been taken to assure that June 30, 1979, unfunded vested benefits do not include ineligible employees such as supervisors or other exempt personnel.

Section 1.06 of the Revised Pension Plan defines an "Employee" as excluding "any self-employed person, whether a sole proprietor or a partner." Similar language is included in the Plan summary plan description at page 20. "Employee" is defined at that section as an employee performing one or more hours of work of the type covered by the collective bargaining agreement, employee members of union or local unions and certain supervisory employees pursuant to regulations adopted by the Trustees.

Employer contributions and Trust benefits are based on covered hours of service reported on the monthly employer remittance report. Instruction No. 6 of the report provides that, "Contributions from self-employed carpenters cannot be accepted." During June, 1980, all employers were again advised that "owner-operators" are not eligible to participate in the Pension Trust Fund as they do not qualify as an "employee."

Trust Fund remittance reports are reviewed by Fund Manager personnel to determine whether contributions are being made on other than employees as a function of the name of the business entity and the individuals being reported on.

Very truly yours,

/s/ _____
John W. Hill

/s/ _____
Paul T. Bailey
Co-Legal Counsel

bcc: Joint Executive Committee
United States National Bank of Oregon,
Ms. Dolores H. Taylor

RECEIVED
AUG 28 1981
MILLER, NASH, YERKE,
WIENER & HAGER

[26] **MARTIN E. SEGAL COMPANY**
57 POST STREET • SAN FRANCISCO, CALIFORNIA 94104 • (415) 392-0930

August 26, 1981

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

Donald A. Burns, Esq.
900 S.W. Fifth Avenue
Portland, Oregon 97204

Re: Oregon-Washington Carpenters-Employers
Pension Trust Fund—R.A. Gray & Co.
Withdrawal Liability

Dear Don:

As discussed in our telephone conversation of yesterday the following describes the actuarial method used to determine the Fund's total withdrawal liability as of June 30, 1979.

First on the basis of the actuarial assumptions utilized in the periodic annual actuarial valuations of the Fund the present value of all of the Fund's vested benefits are calculated.

A second calculation of the present value of vested benefits is made based on the Fund's ongoing actuarial assumptions except that the interest rates promulgated by PBGC for single employer terminations are used. (The PBGC interest rate assumptions vary from 7.50% down to 4.00% depending upon the time left to retirement.)

The Funds assets as of June 30, 1979 on a market value basis are divided by the present value of vested benefits as determined by the second calculation above. The reciprocal of this factor is then applied to the present value amount determined by the first calculation described above and the result is the net total withdrawal liability as of June 30, 1979 for all employers.

In performing these calculations we relied on the contribution data and individual participant records as supplied by the Fund Office and made no explicit allowance for administration expenses. Also amendments effective after June 30, 1979 were not included.

Please advise if you have any questions.

Sincerely,

James P. Lowe

tjr

cc: Paul T. Bailey, Esq.

[29] [EXHIBIT FIVE TO STATEMENT OF REASONS
AND AUTHORITIES OF PBGC]
OREGON-WASHINGTON CARPENTERS-EMPLOYERS
TRUST FUNDS
[PORTION OF LETTERHEAD OMITTED IN PRINTING]

RECEIVED
SEP 17 1981
MILLER, NASH, YERKE,
WIENER & HAGER
September 16, 1981

Mr. Thomas M. Triplett
Attorney at Law
1200 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

Subject: Oregon-Washington Carpenters-Employers
Pension Trust Fund
Multiemployer Pension Plan Amendments
Act of 1980—R.A. Gray & Co.

Dear Mr. Triplett:

We are in receipt of your September 10, 1981, letter.

Requested Documents. We enclose a copy of the Pension Trust Fund actuarial valuations as of June 30, 1978, June 30, 1979, and June 30, 1980. We also enclose the August 26, 1981, letter from Martin E. Segal Company referred to in our September 3, 1981, letter.

Supervisory Employees. You indicate in your letter that your primary concern with respect to ineligible employees relates to work by supervisory employees. As indicated in our September 3, 1981, letter, the term employee is defined at Pension Plan Article I, Section 1.06, to include certain supervisory employees as follows:

"* * * The term 'Employee' also means an employee employed by an Individual Employer in a *supervisory capacity* who had earned Credited Service under this Pension Plan at any time prior to his employment in a supervisory capacity, pursuant to regulations adopted by the Trustees." (Emphasis added)

Supervisory employees are permitted to continue their Plan participation if their employer enters into a special [30] agreement with the Trust Fund to provide for their coverage. Absent such agreed upon coverage, supervisory employees cannot continue Pension Plan participation.

As recently as April, 1980, all contributing employers were notified that supervisory employees were ineligible to participate absent a special agreement. Similarly, all new contributing employers are also notified of that requirement.

We are advised that the Fund Manager regularly reviews employer remittance reports to determine whether an employer may be contributing on a salaried supervisory employee who has not been covered by a special agreement. On a random basis, a number of an employer's monthly reports are compared. A flat number of hours contributed with respect to an employee over a period of time usually indicates salaried rather than hourly employment.

Multiemployer Act Litigation. As there is no meeting of the Board of Trustees Joint Executive Committee scheduled prior to the initial payment date for R.A. Gray & Co.'s first withdrawal liability payment, we are unable to advise you of the position of the Board of Trustees regarding the pending litigation concerning the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). It is our understanding that the status of the pending Illinois litigation is merely that the Federal District Court may properly hear the questions raised in the complaint. There has been no ruling by any court on the constitutionality of the Multiemployer Act. Until such time as the United States District Court for the District of Oregon rules on the questions involved or until the United States Supreme Court decides those questions, we would not recommend and it is unlikely that the Board of Trustees would seriously consider a moratorium on the collection of withdrawal liability payments as required by the Multiemployer Act. In addition, it is doubtful whether the Trust Fund would consider joining with R.A. Gray & Co. in litigation similar to the Illinois litigation.

Yours very truly,

/s/

Donald A. Burns

/s/

Paul T. Bailey
Co-Legal Counsel

[32] [EXHIBIT SIX TO STATEMENT OF REASONS
AND AUTHORITIES OF PBGC]

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
TRUST FUNDS

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

RECEIVED
SEP 26 1981
MILLER, NASH, YERKE,
WIENER & HAGER

September 25, 1981

R.A. Gray & Co.
P.O. Box 23516
Tigard, Oregon 97223

Subject: Delinquent Withdrawal Liability
Payment

Dear Sirs:

Your quarterly withdrawal liability payment due within 60 days of the July 24, 1981, demand has not been received and is *delinquent*.

Interest accrues on your delinquent payment based on prevailing market rates for comparable obligations in accordance with Pension Benefit Guaranty Corporation regulations which have not yet been issued. Absent contrary regulations, interest accrues on your delinquent payment in the amount of \$8.74 a day from the initial due date through the date the delinquent withdrawal liability payment and accumulated interest is received by the Trust Office.

If that quarterly payment, together with interest, is not received within 60 days after your receipt of this letter, your withdrawal liability payment will be in default. In the event of a default, the Board of Trustees hereby demands immediate payment of the entire balance of your withdrawal liability, \$201,359, plus interest on that amount from the due date of the first quarterly payment that was not timely made.

Yours very truly

/s/

Dolores H. Taylor

cc: Co-Legal Counsel
Mr. Thomas M. Triplett
Certified Mail # 124483

[33] [EXHIBIT SEVEN TO STATEMENT OF REASONS
AND AUTHORITIES OF PBGC]

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS
ATTORNEYS AT LAW
1200 STANDARD PLAZA
1100 S.W. 6TH AVENUE
PORTLAND, OREGON 97204
TELEPHONE 503-222-9981

RECEIVED
OCT 14 1981
MILLER, NASH, YERKE,
WIENER & HAGER

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

October 12, 1981

Oregon-Washington Carpenters-
Employers Trust Fund
306 SW Sixth Avenue
P.O. Box 3168
Portland, Oregon 97208

RE: *R.A. Gray & Co.*

Gentlemen:

R.A. Gray & Co. is in receipt of the notice notifying it of an assessment of withdrawal liability. It protests the assessment and requests review by the plan sponsor as follows:

1. Whether there was and remains a labor dispute.
2. Whether it would be constitutionally permissible to assess withdrawal liability against R.A. Gray.
3. Whether the trustees satisfied their fiduciary responsibilities in electing the withdrawal liability formula chosen.
4. Whether the schedule of payments is appropriate.
5. Whether the actuarially determined unfunded vested benefits are accurate.
6. Whether portions of the actuarially determined unfunded vested benefits and/or liability relate to persons not otherwise qualified to participate in the plan.

[34] 7. Whether a transfer from the Plan to the R.A. Gray Plan would be appropriate.

8. Whether there was a permanent termination of an obligation to contribute and if so, when?

We would be happy, at an appropriate time within the 90 days set forth in Section 4219 (b) and (2) (A) to furnish such additional relevant information as you may require in order to assess our request for review. More specifically, we would be happy to make personnel of the Company available and also to have our actuary meet with yours for such purposes as are suggested to be prudent.

Very truly yours,

/s/

THOMAS M. TRIPLETT

TMT/baw

cc: Mr. John Bentley
Mr. William B. Crow
Mr. Paul T. Bailey
Mr. Ron Hall

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

MOTION FOR SUMMARY JUDGMENT**[CAPTION OMITTED IN PRINTING]**

Plaintiff, R.A. Gray & Co., moves for summary judgment against defendants, and each of them, pursuant to the provisions of Rule 56, F.R.C.P., upon the ground and for the reason that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS

By: /s/ Thomas M. Triplett

Thomas M. Triplett
Attorneys for Plaintiff

[2] Plaintiff will rely upon its briefs previously filed in connection with its Motion for interim relief, together with the brief (to be filed pursuant to Court Order on November 10, 1981) in opposition to defendant Oregon-Washington Carpenters-Employers Pension Trust Fund's Motion for Summary Judgment.

TRANSCRIPT OF PROCEEDINGS

November 16, 1981

Portland, Oregon

[CAPTION OMITTED IN PRINTING]

Before

The Honorable James A. Redden, United States District Court Judge.

Appearances:

Mr. Thomas M. Triplett and Ms. Mildred J. Carmack, Of Attorneys for Plaintiff;

Messrs. William B. Crow, Donald Burns and David Paul, Of Attorneys for Oregon-Washington Carpenters-Employers Pension Trust Fund;

Mr. Baruch Fellner, Of Attorneys for Pension Benefit Guaranty Corporation

[2] THE CLERK: This is Civil No. 81-912, R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund, et al. This is the hearing on preliminary injunction and cross motion for summary judgment

MR. CROW: Your Honor, William Crow, speaking on behalf of the trust fund. I'd like to introduce to the Court Mr. Baruch Fellner, who is a member of the District of Columbia Bar, as well as the Ninth Circuit Court of Appeals. He is here representing the Pension Benefit Guaranty Corporation.

THE COURT: All right. I have had an opportunity to review this matter in great detail and also your briefs and everything that has been filed in the matter. Let me make a statement at the outset which would be an indication the way I am going to rule and ask you to respond to it.

As you know, the case is here on plaintiff Gray's request for a preliminary injunction. Gray seeks to order defendant Trust to withdraw its notification of assessment against it, and to enjoin Trust's actions to collect or to declare Gray in default for failure to pay the alleged "withdrawal liability." They seek this preliminary injunction pending determination of the underlying action for declara-

tory judgment. [3] The claimed withdrawal liability exceeds \$200,000.

Those parties have also filed cross motions for summary judgment on the underlying declaratory judgment action. Those motions are also before the Court.

As to the preliminary injunction, Gray cannot prevail unless it demonstrates a combination of probable success and the possibility of irreparable injury, or that serious questions are raised and the balance of hardship tipped sharply in its favor. The bottom line in this case is irreparable harm.

I believe that the preliminary injunction should be denied because Gray cannot demonstrate irreparable harm.

Their options include:

1. Payment of the sum in quarterly payments or in full, and subsequent recovery of those sums if they prevail in this or any like action.

2. Submission to arbitration (which would seem necessary to determine if they have actually withdrawn, which they now deny.)

3. If they lose arbitration they can pay and then challenge and recover if the arbitrator was incorrect, or

4. They can simply refuse to pay and [4] assert their constitutional defenses in the lawsuit which will then be brought against them by the Trust.

I think Gray's approach to this matter is imaginative and counsel has demonstrated that, if not irreparable harm.

I firmly believe it would be inappropriate to rule on the motions for summary judgment. To rule would require ruling on constitutional questions at a time when such a ruling is not clearly necessary. It may be that arbitration will be dispositive and these questions need not be ruled upon for the benefit of these parties. The constitutional questions can be better answered in an action brought against Gray, by the Trust, for collection of the monies.

It seems to me that these proceedings should be stayed while Gray pursues arbitration or defends against the Trust's action for collection (which I assume will be filed).

I do not find that submitting to arbitration, or defending a lawsuit are irreparable harm.

Mr. Triplett.

MR. TRIPLETT: Your Honor, Tom Triplett. Let me first address the question of what it is that would be submitted to arbitration because I think that depends in what you just stated. [5] In the communications which we submitted to the Trust we suggested as issues for their review is as follows:

First, is the Multi-Employer Reform Act of 1980 constitutional? That really isn't an issue that the trustees are particularly well trained to cope with.

The second question is: Is there a labor dispute within the meaning of the 1980 Act. That hasn't been interpreted. It's a question of law. The facts set forth in the affidavit are very simple.

In February, notice of termination was given.

On June 1, the contract terminated. The carpenters commenced to picket on June 1 and have continued to picket. Those are the facts, clear and simple. No issue as to whether those are the facts. Those are the facts, not contested.

What is the issue that arises? Was there a labor dispute and does it continue, an issue of law which must be determined ultimately by a Court.

The next question: Was there a "permanent" cessation of the relationship between the parties in order to trigger withdrawal liability?

Well, what does the word "permanent" mean? That's the word in the statute. We asked the [6] trustees to review and would request ultimately the arbitrator to determine what the word "permanent" means as employed within the meaning of the statute. That's a legal issue, pure and simple.

We would contend, for example that the word "permanent" destroys the entire statutory frame of reference. How do you know something is permanent? What did Congress intend by the use of the word "permanent"? Does it mean if 17 years from today if R.A. Gray's employees elected to be represented again by the carpenters, that that wasn't a permanent cessation and the money should be paid

back? Issue therefore, question of law. What does the word "permanent" mean as used in the statute.

The next question that we asked, "Please tell us what the actuary assumptions are so that we know whether a \$200,000 or \$250,000 is the correct number, not the question of whether liability, but simply the question how bad is the amount of liability we are talking about. This doesn't affect the question of whether there were withdrawal liabilities, but simply the sum of it.

Then we also inquired whether they had people within the plan, such as supervisors and others on whose behalf contributions were made who are [7] disqualified by the terms of the plan, but because of the disproportionate number of them there may be an enhanced amount of withdrawal liability. Again, not a question of whether there is liability, but whether the liability which is set at \$200,000 is the correct sum.

But, as I say, not whether there was liability.

In conclusion, what we have asked is for the trustees and ultimately for the arbitrator to determine questions of law. Any question of fact only goes to the question of how much, not whether. Any question of consequences, we don't believe it appropriate to go to that hearing and to the expense of it.

One of the issues which is raised by Your Honor's suggestion, we urged that the entire collection scheme of the statute is unconstitutional in that it deprives R.A. Gray of a right to a jury. The scheme of the statute states that the trustees will make a determination of the amount of underlying liability. It provides then that we have the right to object and ask for a review.

Now, what is the standard for review that is set forth in the statute? It doesn't say anything except that the determination of the plan-sponsors shall [8] be given by the arbitrator credence unless it is overshadowed that the determination was clearly erroneous or unreasonable.

So the first bar of review, which is under 4211(a)(3) the plan sponsor, Union trustees and Employer trustees, take the first cut and their decision will not be overruled by the arbitrator unless unreasonable or clearly erroneous.

Consider that scheme of things when you look to who the plaintiff is. The plaintiff is now a non-union contractor. Do we really believe that the union trustees can give that non-union contractor a fair day in Court in their review? And, who are the other trustees? Employer trustees who are union contractors who would love to have a leg up on R.A. Gray. Again, a clear motive, not to issue dispassionate justice. So we have two interested parties, union trustees, management trustees, who are going to decide whether R.A. Gray has legal defenses; and, their determination is to be given tremendous weight by the arbitrator.

Now, that, in effect, type of kangaroo session contemplated by this Act are in and of themselves unconstitutional on due process grounds and on the Seventh Amendment ground. We then carry it one step further. [9] The arbitrator, locked in as he is, with this standard to review what the trustees have decided, he then enters an opinion which apparently the Court, upon review, cannot challenge unless it finds by the clear preponderance of evidence that the arbitrator has erred; so, we have a two level review process within internal standards of review that literally makes it impossible to claim that R.A. Gray would receive due process.

Now the Court opined, "Well, even after this double review process is completed, we could come back to this Court; and, if they were wrong, get the interim payments back." There is absolutely not one word in the statute that says that we are entitled to get any payment that we made back.

In urging the point, the Government cites some legislative history. That's all it cites for support that we can get our money back. This Court is probably familiar with the fact that under ERISA, there was a very obscured statute that says, "You're entitled to a refund for up to one year." So people who had been making contributions for five or six years erroneously, got one year back. We argued what the meaning of the one year was. We said it didn't mean what it said. It never was ultimately resolved; and finally in the Pension Reform Act of 1980, it was changed. [10] But the fact of the matter is, this creature of a statute that says:

"We impose liability," has no provision that says, "If you pay erroneously, you get it back."

Now, I submit that is irreparable harm if we aren't entitled to get the money back there are other things about injury which I think needs to be considered?

THE COURT: What if you just refused to pay, you get sued and then you have the opportunity to set forth your constitutional defense in a straight out lawsuit.

MR. TRIPLETT: Well, as you know, acceleration is permitted under the statute. With acceleration, that means instead of \$16,000, \$207,000 are owing now.

THE COURT: I'm aware of that. You haven't paid it. You can refuse to pay.

MR. TRIPLETT: Yes, we can refuse to pay; but then it becomes \$207,000 on the 23rd of November. And, instead of three years of 16's, I submit that's a significant difference. Then, what do we do with our balance sheet? You have got to remember this is a contractor, general contractor. What do they do? What is their lifestyle? They bid on projects. They have got to know what their costs are in order to make proper [11] bids. If they don't know what their costs are, then they are in jeopardy of having catastrophic losses on project by project. And if they are successful in a bid, they have to have a bond.

* * *

[19] THE COURT: I will be interested in the argument that Mr. Triplett has made that there is no guarantee if he pays this money and he turns out to be right that he would get the money back either in the statute or in any agreement made or that could be made.

MR. CROW: I can respond to that, Your Honor. That is one of the elements of irreparable harm that Mr. Triplett has suggested. Although there is no provision in the statute expressly giving an employer who has made erroneous contributions the right to recover that contribution, we are satisfied—the Trust is satisfied that he does have that right—the employer does have that right. We are prepared to agree today here in Court that if the contribution is made and it is ultimately decided that this withdrawing em-

ployer wasn't obligated to make it, he will be entitled to receive the contribution back.

THE COURT: Is there anything in the statute that anybody is aware of that would prohibit that type [20] of agreement?

MR. CROW: We can find nothing that would prohibit it, Your Honor. Indeed, we think legally there should be no question and the Court could require that repayment be made.

If I may just respond to some of Mr. Triplett's arguments and the reason we think there is no irreparable harm and why no preliminary injunction should be issued, in addition to the fact we certainly concur that if payment is made erroneously, it should be repaid. We agree to do that. If there is any question about the obligation or the right of the Trust to make such an agreement, we will take the next step and suggest to the Court that if the payments are to be made, they could be made to an escrow account and paid over to the party who prevails ultimately so that party will not have lost the use of those funds.

The arguments that Mr. Triplett has made seems to me do not rise to the level of irreparable harm with respect to the standard of review by a jury and lack of a jury trial. Ultimately, Mr. Triplett will have his day in Court if that's what he wants on behalf of his client.

I don't believe the creation of presumptions or burdens of proof that may be imposed by [21] statute gives rise to a constitutional issue. But if they do, he again will have that right ultimately to present the arguments in Court.

The Trustees, of course, in this connection are fiduciaries [sic] for the sole benefit of the employees and make determinations as to withdrawing employer liability with that fiduciary [sic] obligation in mind.

The arbitrator's decision may be reviewed and insofar as I know, there is no case which holds—I can't imagine such case holding that the creation of a burden of proof of preponderance of the evidence gives rise to any constitutional issues.

Mr. Triplett suggested there is nothing for the arbitrator to decide. He suggested again that there is complete

agreement on facts. We are not prepared to suggest there is complete agreement on facts. No discovery has been had today. And, we expect that the arbitrator will be required to find factual matters in connection with when the labor dispute started and how long it continued and when Gray was a withdrawing employer. Those are things we would expect findings of fact on.

I heard Mr. Triplett's argument about the bonding capacity of his client and how this somehow creates some irreparable harm. I don't know, first of all, [22] what the difference is between this contingent liability and any other contingent liability that an employer faces in any kind of litigation in which he is involved.

But secondly, I don't know, and I can't conceive of what value a preliminary injunction does. The preliminary injunction doesn't say he is not required to pay the \$201,000. It simply says he doesn't have to pay it yet until the determination is made. And, Mr. Triplett's client has that opportunity right now. The preliminary injunction does not change the facts of whether he does or does not owe; and, if he is required to put it on the balance sheet, and if no preliminary injunction is granted, it would appear to me he would be required to put it there in any event until there is a final determination.

As to the fact that he has to know the cost he is incurring so liability that he doesn't know about that he has to factor into a bid, the contribution that the Trust has requested and intends to enforce are comparable to those contributions being made by contributing employers; those who do belong to the unions and have union contracts and are continuing to make the contributions into the Trust, that is a factor that each of the competing bidders is required to take into consideration.

[23] Mr. Triplett is incorrect with respect to the liquidated damages. I believe the statute gives a right up to 20 percent liquidated damages. But the Trust must select a factor. The factor that this Trustee has selected is based upon the interest rate of money at the time, which may or may not be 20 percent. But it amounts to what it costs the Trust for not having the money when it was entitled to

have it. That is liquidated damages that Mr. Gray would be required to pay.

Insofar as the cost of arbitration, Mr. Gray may be prepared to waive arbitration. The Trustees are not. The statute requires us to proceed if he demands arbitration. If not, then we will simply try and collect the money which we believe is due. If he does demand arbitration and prevails, the statute, 164221(a)(2) [sic] [Section 4221(a)(2)] gives the arbitrator the right to assess costs where the arbitrator thinks they should be, including the allowance of the attorney's fees if the arbitrator comes to the conclusion that should also be awarded for one party or the other.

So the cost is a factor. It may or may not be recovered by the employer.

In any event, the statute gives us—gives him that option to choose.

[24] The only other argument suggested in the brief in support of the motion for temporary injunction, I believe, which is not addressed by Mr. Triplett was the cash flow reduction. Again, we concur with Your Honor, there simply has been no showing which gives rise to irreparable harm. And, the employer has the option available to it that you suggested; and, we believe that the statute should be followed and followed promptly. We concur that there is no reason at the present time to decide the motion for summary judgment. We think they are not ripe. We should ultimately establish whether there is or is not withdrawal liability first.

* * *

[26] [By Mr. Fellner:] We think it is critical that employers who withdraw are not permitted to truncate [sic] [truncate] the process which has been established to determine whether or not there has been a withdrawal, the appropriate amounts of withdrawal liability and the myriad of other factual and other legal issues which are properly before arbitration.

This is the process that the statute has set up. This is the process, we submit as Your Honor previously indicated, this is the process that should be exhausted.

With regard to irreparability—I guess the reason I set between the two sides is because P.B.G.C. finds itself in disagreement to an extent with both sides. It is our view, to further buttress your conclusion that pending arbitration, there is no acceleration, there is no default, and there are no liquidated damages as long as Gray exhausts its remedies available to it under the Act, then it will not be saddled with the [27] kinds of accelerated responsibility of some \$206,000 that we have heard about this morning.

We submit as indicated in our brief that the statute supports this fundamental policy conclusion that we have arrived at, specifically in Section 4221(b)(1) of the statute, it reads:

“If no arbitration proceeding has been initiated pursuant to subsection (a), the amount demanded by the plan sponsor shall be due and owing on the schedule set forth by the plan’s sponsor.”

We submit that the implication of that sentence is that if an arbitration has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsors are not due and owing. That conclusion is buttressed by the second sentence of Section 4221(d); and, that sentence reads:

“If the employer fails to make timely payment in accordance with such final decision of the arbitrator, the employer shall be treated as being delinquent in the making of the contribution required under the plan.”

The clear implication of that sentence is no delinquency occurs until and unless there is a [28] final decision by an arbitrator.

Now we would be the first to concede, Your Honor, this statute is complex; and, in some respects, it is not the model of clarity. But on this particular issue, we feel that the salutary purpose of the policy we have enunciated in this brief, a policy which we are working on currently, reducing it to a regulation, that this salutary policy, combined with statutory provisions referred to as well as the legislative history recounted in our brief, make it clear that there is no acceleration, no default, no liquidated damages during the pendency of arbitration proceeding.

Finally, Your Honor, even if our reading of the statute is erroneous, and we submit as Mr. Crow has properly indicated that what Mr. Triplett has indicated this morning does not rise to the level of irreparable harm. The simple paying of money has been held time and again beginning with *Sampson v. Murray*—

THE COURT: I am aware of that.

* * *

[31] [By Mr. Triplett:] Now, secondly, there was a statement made by counsel for the Pension Benefit Guaranty Corporation that (a) there is no acceleration and (b) no liquidated damages. I would love to join him in having that declared to be the law. But counsel selected only a portion of the law and did not bring the Court's attention to the immediately prior section 4219 in which it says: "Withdrawal liability shall be payable in accordance [32] with the schedule set forth by the plan's sponsors * * * notwithstanding any request for review or appeal of the amount of such liability or the schedule." So, this section of the law says, "notwithstanding review, the money is owing."

THE COURT: Doesn't the reading of the two sections indicate not immediately?

MR. TRIPLETT: In the same section where they say notwithstanding the pendency of, they then say, if you don't pay, you're in default. It falls within the same section of the statute. In a completely different section of the statute is the statute that is referred to by counsel for the Government.

Quite frankly, it is a nightmare to know whether those oblique statements under the arbitration provision—

THE COURT: What is the defendant's position on that if plaintiff should seek arbitration?

MR. CROW: We do not concur with the pension Benefit Guaranty Corporation attorney on the law. We believe we are entitled to give notice of acceleration. It could be as Mr. Fellner says, if they are adopting regulations that will supersede ours, that might be the case. But at this point, we believe we are entitled to accelerated damages if quarterly payments are not made.

[33] THE COURT: Even if request for arbitration?

MR. TRIPLET: Well, I would like to join with the Government quite obviously on whether acceleration is permissible pending review and whether liquidated damages can be assessed despite a request for review. We don't know what the law on the subject is. There is great risk to my client in the absence of a ruling. There are two sections of the statute which appear to be diametrically opposite positions on that.

* * *

[39] [By Mr. Fellner:] I think it is very important to perceive that the interests of some pension funds, as well as the interests of some employers who are withdrawing, are shared.

And, consequently, it is absolutely important that arbitration proceed so that the real factual issues that are present in these cases are ventilated before the legal issues are decided.

THE COURT: I will rule this week. I understand the time restraint. I may be advising you before an opinion is issued of my ruling.

As I hear the arguments, if I rule against the employer for a preliminary injunction, arbitration would be the consequences. Obviously, my ruling isn't going to change your options. There are other options available as I indicated earlier. But let me give your arguments, which were very excellent, some further thoughts. I will rule yet this week.

(Conclusion of proceedings.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 81-912-RE

OPINION

R.A. GRAY & Co., PLAINTIFF,

v.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION
TRUST FUND AND PENSION BENEFIT GUARANTY
CORPORATION, DEFENDANTS.

Thomas M. Triplett
Mildred J. Carmack
Schwabe, Williamson, Wyatt,
Moore & Roberts
1200 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204
Attorneys for Plaintiff.

William B. Crow
Miller, Nash, Yerke,
Wiener & Hager
900 S.W. Fifth Avenue
Portland, Oregon 97204

David S. Paull
Bailey & Paull
5441 S.W. Macadam Avenue
Portland, Oregon 97201
Attorneys for Defendant
Oregon-Washington Carpenters-
Employers Pension Trust Fund.

[2]

Henry Rose, General Counsel
Baruch A. Fellner, Associate General Counsel
J. Stephen Cafilisch, Special Counsel
David F. Power, Attorney
Pension Benefit Guaranty Corporation

Office of the General Counsel
 2020 K Street, N.W.
 Washington, D.C 20006
 Attorneys for Defendant
 Pension Benefit Guaranty
 Corporation.

REDDEN, Judge:

Plaintiff R.A. Gray and Co. (Gray) moves for entry of a preliminary injunction ordering the defendant Oregon Washington Carpenters-Employers Pension Trust Fund (Trust) to: (1) withdraw its notification of assessment against Gray during the pendency of this action and (2) to take no further steps to collect or to declare Gray in default for failure to pay a sum allegedly owed to the Trust. That sum is \$202,359.00 for "withdrawal liability" based on Gray's purported withdrawal from the Revised Pension Plan for the Oregon-Washington Carpenters-Employers Pension Trust Fund (Plan) which is administered by the Trust. Gray's complaint denies that Gray is subject to withdrawal liability. The complaint also alleges the unconstitutionality of the Employment [sic] Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C.A. §§ 1301-1461 (Supp. 1981). The Trust and the Pension Benefit Guaranty Corporation (PBGC) oppose the entry of a preliminary injunction. The Trust and Gray have filed cross motions for summary judgment.

FACTS¹

1. Parties

Gray is an Oregon corporation which entered successive [3] collective bargaining agreements with the Oregon State Council of Carpenters (Union). The Trust is a trust administered according to the Plan. The Plan is a multiemployer benefit plan within the meaning of ERISA, 29 U.S.C. §

¹ The facts, drawn from the complaint and supporting documents, are taken as true for the purpose of the motion for a preliminary injunction and do not constitute findings of fact.

1301(a)(3). The trustees of the Plan are the plan sponsors as defined in 29 U.S.C. § 1301(a)(10). Gray made contributions to the Trust in accordance with Gray's collective bargaining agreement with the Union. PBGC is a wholly owned United States Corporation which was created by ERISA to administer the pension plan termination program. PBGC shares responsibility for enforcing the mandatory multiemployer pension plan withdrawal liability program which was created by the MPPAA.

2. Background

In February 1980 Gray notified the Union that, effective June 1, 1980, Gray was ending its collective bargaining agreement with the Union. In June 1980, the Union began a strike which still continues. In a letter dated July 24, 1981, the trustees of the Trust notified Gray that Gray had completely withdrawn from the Trust as of June 1, 1980 by reason of (1) the termination of Gray's obligation to contribute to the Trust as of June 1, 1980 and (2) Gray's continuation of work within the same jurisdiction. The letter stated that under section 4211(b) of ERISA Gray had a withdrawal liability of \$202,305.00. The trustees demanded payment and stated that payment was to be made in quarterly payments with the initial payment due sixty days from July 24, 1981. In response, Gray requested that the trustees review the computation of liability.

In a letter dated September 25, 1981, the Plan administrator notified Gray that its initial quarterly payment of withdrawal liability was delinquent and that if the quarterly payment was not received within 60 days, Gray would be in default. The letter also stated that if Gray were in default, the trustees would demand immediate payment of the entire withdrawal liability.

[4] On September 29, Gray filed its complaint in this action. In the complaint Gray denies that it has withdrawn from the Plan and alleges that the MPPAA, as applied to Gray: (1) violates the fifth amendment of the United States Constitution by arbitrarily imposing retroactive liability, (2) violates the fifth and seventh amendments by compelling Gray to submit to arbitration, (3) violates the fifth amendment by imposing disproportionate liability of

employers who contribute to other kind of plans and (4) violates article I, section 9 by imposing penalties for events which occurred before the enactment of the MPPAA.

THE MPPAA

The MPPAA imposes liability on an employer who withdraws from a multiemployer plan. The liability is a portion of the unfunded vested benefits and is computed under one of several formulas. The statute was enacted on September 26, 1980 with an effective date of April 29, 1980. Gray challenges the retroactive application of the statute. Section 1399(b)(1) provides that after an employer's withdrawal, the plan sponsor shall notify the employer of the amount of liability and the schedule of payment and demand payment accordingly. Section 1399(c)(2) provides that in the event of default (defined as failure to pay within 120 days of initial demand), a plan sponsor may require immediate payment of the outstanding withdrawal liability plus accrued interest on the payment not timely made. Liquidated damages for delinquent payment of withdrawal liability are available in a suit for delinquent payments under §§ 1132(g)(2) and 1451. Section 1401 provides that a dispute between an employer and plan sponsor concerning the amount of liability shall be resolved through arbitration, initiated by either party within a specified period, and if arbitration is not initiated, the accounts demanded by the plan sponsor are due and owing on the schedule set forth by the plan sponsor.

[5] MOTION FOR A PRELIMINARY INJUNCTION

1. The Standard

In order to obtain a preliminary injunction Gray has the burden of demonstrating:

either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardship tips sharply in its favor. [citation] These are not separate tests but the outer reaches "of a single continuum." *Benda [v. Grand Lodge of International Association of Machinists, etc.]*, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed 441 U.S. 937 (1979)].

Los Angeles Memorial Coliseum Com'n v. Nat. Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). To meet its burden under this standard, Gray must demonstrate, at a minimum, the possibility of irreparable injury.

In *Los Angeles Coliseum*, *supra*, the trial court found that the injury to the movant was "lost revenues." *Id.* at 1202. The Ninth Circuit reversed the order granting a preliminary injunction because the plaintiff had not made the requisite showing of irreparable harm. *Id.* at 1203. The court said:

Even if some significant threat of injury be hypothesized, it was neither found nor shown to be *irreparable*. [emphasis by the court] The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies. *Sampson v. Murray*, 415 U.S. 61, 88 ... (1974).

Id. at 1202. The court then quoted *Sampson v. Murray*, 415 U.S. at 90,

[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury ... 'The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'

Id.

[6] 2. *Gray's Argument*

Gray alleges that it will suffer irreparable harm if an injunction is not entered restraining the Trust from collecting any of the alleged withdrawal liability. The irreparable harm alleged is (1) "the loss of use of substantial amounts of capital" which Gray must pay the Trust to avoid further liability and (2) "unnecessary arbitration proceedings."

Gray argues that because ERISA does not explicitly state that the Trust has the obligation to repay funds wrongfully received, there is the possibility of damage to Gray if it makes payment and there is a later determination that Gray does not owe the money. Gray also argues that

unless the Trust's attempt to collect the money is restrained, Gray will suffer impaired bonding capacity and inflated bids which will result in a reduction of income. Gray argues that if it engages in arbitration and the court later finds the statute unconstitutional, Gray will have been subjected to unnecessary expense in connection with the arbitration.

3. Discussion

I am denying Gray's motion for a preliminary injunction because I find that Gray has failed to demonstrate the possibility of irreparable injury. Gray has demonstrated the possibility of lost revenues and the loss of time spent in arbitration. Gray has demonstrated that it would prefer to avoid paying the withdrawal liability and arbitration while seeking judicial review of the MPPAA.

I find that payment of the quarterly payments will not cause Gray irreparable harm. Gray has not alleged that the payments will jeopardize the existence of the company. Even if ERISA does not provide an explicit mechanism for the return of moneys determined to be wrongfully paid, Gray's loss would be recoverable. The attorneys for the Trust stated in oral argument that the Trust was prepared to agree that Gray will be entitled to a refund of [7] its contributions if it is ultimately determined that Gray owes less than it has paid. The attorneys for the Trust also stated that Gray's payments can be made to an escrow account which will be paid over to the prevailing party.

I find that Gray's spending time and money to arbitrate the dispute concerning its withdrawal liability will not cause Gray irreparable harm. "Mere litigation expense, even substantial and unrecoupable cost does not constitute irreparable injury." *Renegotiation Board v. Bannerkraft [sic] Clothing Co., Inc.*, 415 U.S. 1, 24 (1974). Gray alleges that it has not "withdrawn" within the meaning of the statute. This issue is particularly appropriate for resolution through the arbitration process. Such a resolution would be in accord with the well settled principle that the constitutionality of a statute should be addressed only as a last resort.

Because I have found that Gray has not demonstrated the threshold requirement of irreparable injury, I do not reach the question of the likelihood of success on the merits.

MOTIONS FOR SUMMARY JUDGMENT

The motions for summary judgment are not ripe for decision. If Gray requests arbitration then this case should be stayed pending the arbitrator's decision and the motions for summary judgment will be addressed after that decision. If Gray does not request arbitration, I will rule on the motions after full briefing of all the issues by all the parties.

Dated this 1st day of December, 1981.

/s/

James A. Redden
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
DEC 1-1981
Robert M. Christ, Clerk
By: _____ Deputy

ORDER

**[CAPTION AND NAMES OF COUNSEL OMITTED
IN PRINTING]**

[2] REDDEN, Judge:

IT IS ORDERED that plaintiff's motion for a preliminary injunction is denied.

Dated this 1st day of December, 1981.

/s/ _____
James A. Redden
United States District Judge

[CAPTION OMITTED IN PRINTING]
**ANSWER OF DEFENDANT PENSION BENEFIT
GUARANTY CORPORATION TO COMPLAINT**

First Defense

The complaint of R.A. Gray & Co. ("Gray") fails to state a claim against the Pension Benefit Guaranty Corporation (the "PBGC") upon which relief can be granted.

Second Defense

For its answer to the specific allegations of the complaint, the PBGC states:

I.

Jurisdiction

The PBGC admits the existence of the statutory provisions cited in the two unnumbered paragraphs of the complaint under the caption, "JURISDICTION," but denies that jurisdiction is granted or venue established solely on the basis of those provision.

II.

Parties

The allegation contained in the second of the three unnumbered paragraphs of the complaint under the caption, "PARTIES," [2] that the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust") is the plan sponsor of a multiemployer pension plan, is denied. The PBGC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the first and second unnumbered paragraphs of the complaint under the caption, "PARTIES."

The PBGC admits the allegation contained in the third unnumbered paragraph of the complaint under the caption, "PARTIES," that the PBGC is a body corporate established by Title 29 U.S.C. §1302. The allegation contained in the third unnumbered paragraph of the complaint under the caption, "PARTIES," that the PBGC "is charged by law with the implementation and enforcement of ERISA, as

amended by MPPAA," is denied insofar as it implies that sole or primary responsibility rests with the PBGC.

III.

Claim for Relief Against the Trust

1-2. Unless otherwise specified, references to paragraphs of the complaint in this paragraph and the following paragraphs 2 through 12 of this answer refer to paragraphs of the complaint under the caption, "CLAIM FOR RELIEF AGAINST THE TRUST." The PBGC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 and 2 of the complaint.

3. The allegations contained in paragraph 3 of the complaint are denied insofar as they imply that, either before or after enactment of the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), Pub. L. No. 96-364 (1980), 29 U.S.C.A. §§1001-1461 (Supp. 1981), Gray's financial obligations under the Revised Pension Plan for the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Plan") arose solely from the terms of the Plan and collective bargaining agreements providing for contributions to the Plan. Section 10.03 of the Plan provides, in part, as follows: "*Except for liabilities which may result from provisions of ERISA*, nothing in this [3] plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union." Plan, p. 24 (emphasis added). Withdrawal liability under the Multiemployer Act is a liability which "result[s] from provisions of ERISA." The PBGC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4-5. The PBGC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of the complaint.

6. The PBGC admits the allegation contained in paragraph 6 of the complaint that the Multiemployer Act was enacted on September 26, 1980, and admits the existence of

the Employee Retirement Income Security Act of 1974 ("ERISA"), but relies upon those statutes to speak for themselves.

7. The PBGC admits the allegations contained in paragraph 7 of the complaint.

8. The allegations contained in paragraph 8 of the complaint are denied.

9. The allegations contained in paragraph 9 of the complaint are denied.

10. The allegation contained in paragraph 10 of the complaint that the "arbitrator's findings will be presumptively correct," is denied insofar as it implies that anything other than the arbitrator's findings of fact will be presumptively correct upon judicial review. The PBGC admits the remaining allegations contained in paragraph 10 of the complaint.

11. The PBGC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. The allegations contained in paragraph 12 of the complaint, including the allegations contained in subparagraphs 12(a), 12(b), 12(c), 12(d), and 12(e) of the complaint, are denied.

[4]

IV.

Claim for Relief Against the Corporation

1. Unless otherwise specified, references to paragraphs of the complaint in this paragraph and the following paragraphs 2 and 3 of this Answer refer to paragraphs of the complaint under the caption "CLAIM FOR RELIEF AGAINST THE CORPORATION." In response to paragraph 1 of the complaint, the PBGC incorporates by reference and restates its responses to paragraphs 1 through 12 of the complaint under the caption "CLAIM FOR RELIEF AGAINST THE TRUST."

2. The allegation contained in paragraph 2 of the complaint that the PBGC "is the body charged by Congress with implementation of ERISA as amended by the MPPAA," is denied insofar as it implies that sole or primary responsibility rests with the PBGC. The PBGC ad-

mits the remaining allegations contained in paragraph 2 of the complaint.

3. The allegations contained in paragraph 3 of the complaint are denied.

Further answering the complaint, defendant PBGC denies all allegations not specifically answered or admitted and denies that the plaintiff is entitled to any relief.

Third Defense

The complaint fails to present for adjudication a genuine case or controversy. Accordingly, this court lacks subject matter jurisdiction over the complaint.

Fourth Defense

This action is premature and not ripe for adjudication because plaintiff Gray has not initiated arbitration proceedings, as required by section 4221(a)(1) of ERISA, 29 U.S.C.A. §1401(a)(1) (Supp. 1981), and has consequently failed to exhaust its nonjudicial remedies.

Fifth Defense

This action is premature and not ripe for adjudication because the applicability of the exemptions and relief provisions created by statute has not been determined.

[5] /s/ _____
 HENRY ROSE
 General Counsel

 /s/ _____
 BARUCH A. FELLNER
 Associate General Counsel

 /s/ _____
 J. STEPHEN CAFLISCH
 Special Counsel

 /s/ _____
 DAVID F. POWER
 Attorneys for Defendant
 PENSION BENEFIT GUARANTY
 CORPORATION

AFFIDAVIT OF THOMAS M. TRIPLETT

[CAPTION OMITTED IN PRINTING]

STATE OF OREGON)
) ss.
 COUNTY OF MULTNOMAH)

I, THOMAS M. TRIPLETT, being first duly sworn depose and say:

Attached hereto marked Exhibits A and B are the actuarial reports of the Oregon-Washington Carpenters-Employers Pension Trust Fund for the years ending June 30, 1979 and June 30, 1980. Attached hereto marked Exhibit C is the Trust Plan of the Oregon-Washington Carpenters-Employers Pension Trust Fund.

[2] DATED this 16th day of November, 1981.

/s/ _____

SUBCRIBED AND SWORN TO before me this 16th day of November, 1981.

/s/ _____

Notary Public For Oregon
My Commission Expires: 9/13/85

[3]

[EXHIBIT A TO AFFIDAVIT OF THOMAS M. TRIPLETT]

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND

Sixteenth Annual
Actuarial Valuation and Review
for the Year Ended June 30, 1979

Copyright © by
Martin E. Segal Company
January, 1980

[4] **MARTIN E. SEGAL COMPANY**
[PORTION OF LETTERHEAD OMITTED
IN PRINTING]

January 17, 1980

Board of Trustees
Oregon-Washington Carpenters-Employers
Pension Trust Fund
Portland, Oregon

Gentlemen:

We are pleased to submit our actuarial valuation as of July 1, 1979 and the experience review of the Pension Trust for the year ended June 30, 1979. The contents of this sixteenth annual report will be found in the following sections:

- A. HIGHLIGHTS OF THE YEAR
- B. EMPLOYEE DATA
- C. ANALYSIS OF ACTUARIAL EXPERIENCE
- D. SCHEDULED ACTUARIAL COST
- E. MINIMUM FUNDING STANDARD ACCOUNT
- APPENDIX: GENERAL BACKGROUND
- ATTACHMENT: ACTUARIAL VALUATION
- CERTIFICATE

We look forward to reviewing this report with you at your next meeting. At that time, we will discuss any questions which the Board may have concerning the findings of this study.

Sincerely,

/s/

JAMES P. LOWE
Vice President

fp
cc: Administrator
Co-Legal Counsel
Accountant
Investment Counsel

[5]

A. HIGHLIGHTS OF THE YEAR

The Pension Fund's experience during the 1978-79 fiscal year is summarized as follows:

- By June, 1979, the Trustees had awarded 3,435 pensions, 2,248 of which were still in the course of payment. Pension payments were being continued to 99 beneficiaries. Actual benefit payments amounted to \$3,965,400 for the year.

- Effective July 1, 1979, the Plan was amended to recognize an additional Benefit Unit each year until it reaches 35 units.

- The active membership increased by 12.6% while the total employment activity was almost 18% higher than the prior year's level.

- Contribution income increased by 32% as a direct result of the greater employment activity and a higher contribution rate. Administration expenses were 2.2% of the contributions received.

- Net interest and dividend income produced a return of 5.69%. A review of these results over recent years showed an average return of 4.76%. On the valuation date, 40% of the total invested assets consisted of equities.

- At the end of the 1978-79 Plan Year, Fund reserves reached \$45.9 million—a 19% increase over last year. About 72% of these assets were required to provide lifetime benefits to those members already on the pension rolls.

- Fund assets represented 56% of the Plan's vested liabilities at the end of the year.

- As of July 1, 1979 the Minimum Funding Standard Account showed a funding balance credit of \$4,596,800. The overall Fund experience produced a net experience gain for the year.

* * *

[10]

C. ANALYSIS OF ACTUARIAL EXPERIENCE

Introduction

Actuarial assumptions are made with respect to each aspect of the operation of the fund which affects the accumulation of assets and the disbursement of benefits. As a few examples, assumptions are made regarding the rate of investment return on assets, percent of non-retired participants terminating employment, mortality probabilities for both retired and non-retired participants, and average retirement age among non-retired participants. When experience is, on the whole, financially favorable (for example, investment income is greater than assumed or participants are, on the average, retiring at an older age than anticipated), the fund realizes experience gains. The unfunded accrued liability is reduced by the full amount of the gain and the future contribution requirement is reduced by the amortization of the gain. The reverse is, of course, true if experience is unfavorable relative to the actuarial assumptions.

Since the use of realistic assumptions is an important element in the determination of cost projections, ERISA requires a certification, by an Enrolled Actuary, that the assumptions utilized in the valuation represent the actuary's "best estimate" of future experience under the Plan. The selection of assumptions which satisfy this criterion requires a periodic examination of past experience. An abridged analysis was performed for the year ended June 30, 1979 based on the actuarial assumptions and benefit provisions reflected in the previous valuation. We will continue to review future experience to determine when changes in assumptions are warranted.

Aggregate Experience

On July 1, 1978, the unfunded accrued liability stood at \$60,663,200. For minimum funding purposes, it had been anticipated that this liability would have been reduced by \$704,300 to \$59,958,900 at the end of the year (June 30, 1979) if the actuarial experience had exactly matched the

actuarial assumptions. The overall actual experience of the Fund during the year, which was more favorable than expected, reduced the latter liability to \$56,183,400. This reduction (\$3,775,500) was the result of contribution income in excess of the minimum funding requirement for the year and an actuarial experience gain of \$1,311,700.

* * *

[16]

The Fund, of course, has liabilities not only for presently retired employees but for active and inactive employees who will retire in the future. A summary comparison of Fund assets against liabilities for pensioners and vested employees is as follows:

	Number of Employees	Vested Liabilities
Pensioners and beneficiaries	2,347	\$33,171,300
Non-retired employees eligible for immediate retirement on Regular Pensions		
Active	45	1,428,100
Inactive	215	3,108,900
Non-retired employees eligible for immediate retirement on Early Retirement Pensions		
Active	812	22,309,800
Inactive	268	5,802,900
Other vested employees		
Active	1,206	13,333,700
Inactive	300	3,116,700
Total	5,223	\$82,271,400
Fund Net Assets		45,897,200
Unfunded Vested Liability		\$36,374,200

As of July 1, 1979 the Fund assets represented 56% of the Plan's vested liability.

* * *

[22] 3. *Investment Experience*

For valuation purposes, marketable securities are carried at an adjusted book value which systematically reflects a portion of the capital appreciation or depreciation on investments. Such asset values are affected by dividend and interest income and the annual write-up/down on the mar-

ketable securities. In measuring experience against the interest assumption, it is necessary to take all of these types of earnings into consideration.

During the year 1978-79, such earnings, net of investment fees of \$133,087 totalled \$2,326,084, representing a return of 5.69% on the Fund assets. This return represents a net asset gain of \$282,900, relative to the 5.00% assumption. The total earnings include dividend and interest income of \$2,563,806 equal to 6.27% of assets, and a write-down amount of \$237,722. The determination of the total adjusted book value for marketable securities is shown in Table 9. It should be noted that an investment fluctuation deficiency of \$950,889 existed on the valuation date.

Table 10 traces the components of total investment returns over recent years and shows how those amounts relate to the interest assumptions used. Over the period, the total earnings of \$7.4 million represented an average annual return rate of 4.76%. The corresponding figure exclusive of net realized capital losses (and amounts of write-up/down) of \$724,800 was 5.22%.

On June 30, 1979, the adjusted book value of the Fund's assets amounted [sic] \$45,897,231, showing a 19% increase over the assets of a year ago. A statement of assets for the years ended June 30, 1979 and 1978 is given in Table 11.

A summary of the investment portfolio as of June 30, 1979 is shown in Table 12. A comparison of the cost value versus the market value of the investments is given for your general interest. About 40% of the invested assets consisted of equities.

A picture of the Fund's financial development over its entire period of operations is given in Table 13. It illustrates the rise in contribution income, benefit payments and the ever-growing size of the net assets needed to finance lifetime benefits for existing pensioners as well as those employees who will be retiring in the future.

* * *

[33]

MARTIN E. SEGAL COMPANY
[PORTION OF LETTERHEAD OMITTED IN PRINTING]

January 17, 1980

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND

Actuarial Valuation Certificate

This is to certify that we have prepared an actuarial valuation of the Plan as of July 1, 1979.

The certificate contains the following attached exhibits:

- I: Actuarial Cost for Year Beginning July 1, 1979
- II: Actuarial Assumptions and Funding Method
- III: Minimum Funding Standard Account
- IV: Changes in Actuarial Assumptions
- V: Plan Amendment
- VI: Summary of Plan Provisions

The valuation was based on the assumption that the Plan was qualified for the year and on information supplied by the auditor with respect to contributions and assets and by the Fund Manager with respect to the data required on employees and pensioners.

To the best of my knowledge, the information supplied in this actuarial valuation is complete and accurate (except as may be noted in Exhibit I) and in my opinion the assumptions used in the aggregate: (a) are reasonably related to the experience of the Plan and to reasonable expectations; and (b) represent my best estimate of anticipated experience under the Plan.

MIGUEL A. PADRO, A.S.A., M.A.A.A.
ENROLLED ACTUARY No. 147
ASSOCIATE ACTUARY

* * *

[35]

EXHIBIT II**ACTUARIAL ASSUMPTIONS AND FUNDING METHOD**

Mortality rates: 1971 Group Annuity Table (with ages advanced one year).

Disability mortality before age 65: Assumed as age 65 in above Table.

Termination rates before retirement:

Age	Rate %			
	Death	Disability	Withdrawal	Total
20	.05	.05	7.90	8.00
25	.07	.05	7.68	7.80
30	.09	.05	7.18	7.32
45	.33	.18	3.82	4.33
50	.59	.40	2.22	3.21
55	.93	.85	.20	1.98
60	1.44	1.74	—	3.18
65	2.36	—	—	2.36
70	4.00	—	—	4.00

Retirement Age: For non-disability retirements: age 63, or completion of service requirement, if later.

Investment Return: 5.00% per annum.

Future Service Accrual Rate: 1.125 Benefit Unit per year.

Contribution Income: 1,475 hours per active employee

Administration expenses: \$225,000 per year.

Funding Method: Entry Age Normal Cost.

Valuation of Assets: At Adjusted Book Value*.

*Adjusted Book Value at beginning of year (increased by new money) written up/down by 20% of the difference between Market Value and this figure. The result must not be less than 80% nor greater than 120% of market value; otherwise, a further adjustment will be made.

* * *

[43]

[EXHIBIT B TO AFFIDAVIT OF THOMAS M. TRIPLETT]

**OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND**

Seventeenth Annual
Actuarial Valuation and Review
for the Year Ended June 30, 1980

Copyright © by
MARTIN E. SEGAL COMPANY
January, 1981

[44] **MARTIN E. SEGAL COMPANY**
[PORTION OF LETTERHEAD OMITTED IN PRINTING]

January 30, 1981

Board of Trustees
Oregon-Washington Carpenters-Employers
Pension Trust Fund
Portland, Oregon

Gentlemen:

We are pleased to submit our Actuarial Valuation as of July 1, 1980 and the experience review of the Pension Fund for the year ended June 30, 1980. The contents of this seventeenth annual report will be found in the following sections:

- A. HIGHLIGHTS OF THE YEAR
- B. EMPLOYEE DATA
- C. ANALYSIS OF ACTUARIAL EXPERIENCE
- D. SCHEDULED ACTUARIAL COST
- E. VESTED LIABILITIES
- F. FUNDING STANDARD ACCOUNT
- APPENDIX: GENERAL BACKGROUND
- ATTACHMENT: ACTUARIAL VALUATION
CERTIFICATE

The employee data which served as the basis for the calculations was supplied to us by the Fund Office staff. Their assistance is gratefully acknowledged.

The actuarial calculations were supervised by Miguel A. Padro, A.S.A., Enrolled Actuary.

We look forward to reviewing this report with you at your next meeting. At that time, we will discuss any questions which the Board may have concerning the findings of this study.

Sincerely,

/s/

JAMES P. LOWE
Vice President

fp

Copies to: Fund Office
Co-Legal Counsel
Accountant
Investment Counsel

[45]

A. HIGHLIGHTS OF THE YEAR

The Pension Fund's experience during the 1979-80 fiscal year is summarized as follows:

- By June, 1980, the Trustees had awarded 3,667 pensions, 2,358 of which were still in the course of payment. The average pension amount, for new awards, was \$249 per month. Pro-rata pensions represent about 40% of the new pension awards. Pension payments were being continued to 88 beneficiaries. Actual benefit payments amounted to \$4,158,500 for the year.

- The active membership has shown a steady growth in recent years. During the 1979-80 year it increased by almost 16%. The number of participants has increased each year during the past 5 years. Nearly one half of the participants have attained vested rights.

- Total employment activity has increased 40% during the last three years. The 1979-80 activity was almost 13% greater than the previous year's level. Contribution income increased by 21% as a result of the greater employment activity and a higher contribution rate. Administration expenses were 1.8% of the contributions received.

- Net investment income produced a return of 8.68% for the year. A review of these results over recent years showed an average return of 5.70%. The current investment mix is 60% fixed income and 40% equities.

- At the end of the 1979-80 Plan Year, Fund reserves reached \$56.9 million—a 24% increase over last year. About 62% of these assets was required to provide lifetime benefits to those members already on the pension rolls.

- Fund assets represented 69% of the Plan's vested liabilities at the end of the year. During recent years, an increasingly larger percentage of the vested liability has been funded at the end of each year.

- As of July 1, 1980 the Funding Standard Account showed a funding balance credit of over \$8.7 million. The overall Fund experience produced a net experience gain for the year.

[46]

B. EMPLOYEE DATA

1. *Active and Inactive Employees*

The Fund's actuarial position is redetermined each year on the basis of an updated census of covered employees. The survey includes members who worked at least 300 hours during the Plan Year and had earned a total of at least one full year of credited service by the end of the year. During the year 1979-80, a total of 7,965 employees satisfied the first condition—however, 1,306 of these members failed to earn at least one full year of credited service by the end of the year. The actuarial cost, therefore, was calculated on the basis of 6,659 employees who are designated as "active" for the purposes of this valuation. Those employees with less than one year of accumulated credited service are excluded since they are regarded as replacements of employees who left covered employment during the year but are still included in the census.

A summary of changes in the number of active employees and their basic data characteristics is shown in Table 1. The number of active employees increased by 15.6% over the previous year. The active membership has increased over 34% during the past three-year period.

Of the 6,659 active members, 1,990 (or 30%) had met the requirements for vested rights (including 805 members who were eligible to retire immediately). About three out of every four active employees worked at least 1,200 hours this year (over 25% worked more than 1,800 hours). The current census of active employees appears in Table 2.

On June 30, 1980 there were 857 employees who had met the requirements for vested rights compared to 813 the previous year. Though these members were inactive during the year—they failed to work at least 300 hours—the Fund has a potential liability to provide benefits to these members when they decide to retire. About 27% of these members were age 65 or older. A census of these employees is shown in Table 3. No account is taken of the potential liabilities for inactive employees who are not vested but who

may return to covered employment before they suffer a permanent break in service.

[47] 2. *Retired Employees*

The Trustees awarded 232 pensions during the year ended June 30, 1980. Distributions of these new awards by type of pension, monthly benefit amount and age on the effective date are given in Tables 4 and 5. It is observed that: (a) 27% of these pensioners elected Husband-and-Wife Options; (b) the average new award (excluding Pro-Rata pensions) received \$249 per month; (c) 57% of the new awards (excluding Pro-Rata) were Early Retirements and 15% were Disability pensions; and (d) about 2 out of every 5 pensions were Pro-Rata pensions. The Trustees also granted 11 pre-retirement Death Benefit awards this year. A summary of recent pension awards by type of pension is shown in Table 6. Pro-Rata pensions represent about 45% of all the awards granted during the period. Among non-Pro-Rata pensions, Early Retirements account for 55% of the awards.

During the year 1979-80, two pensions were suspended, five were reinstated, 35 were cancelled or paid as lump sum and 90 were terminated due to death. On June 30, 1980, there were 2,358 pension awards still in the course of payment. The average pension amount among the existing pensioners (excluding Pro-Rata and Basic pensions), on the valuation date, was \$170 per month compared to \$162 per month the previous year. (The pension amounts ranged from less than \$100 to a highest of \$390 per month.) In addition to the pensioners on the rolls, there were 88 beneficiaries receiving benefits for an aggregate amount of \$11,823 per month. Table 7 shows a distribution of the pensioners on the rolls as of June 30, 1980 by type of pension and monthly benefit amount. The same awards are distributed in Table 8 by type of pension and age on the valuation date.

The progress of the pension rolls is given in Table 9. Of the 3,667 pensions awarded since pension payments began in July, 1963, 802 have been terminated on account of death, 13 are in a suspended status and 494 cancelled by other reasons (i.e., lump-sum settlements) as of June 30,

1980. Actual benefit payments amounted to \$4,158,514 during the year compared to \$3,965,367 the previous year.

3. *Summary of participants*

A summary of the number of participants for recent years is shown in Table 10. The number of participants has increased steadily during the past five years. Due to the influx of new carpenters, the percentage of participants who have attained vested status has dropped from about 60% five years ago to about 50% in the past two years.

* * *

[58]

C. ANALYSIS OF ACTUARIAL EXPERIENCE

Introduction

Actuarial assumptions are made with respect to each aspect of the operation of the fund which affects the accumulation of assets and the disbursement of benefits. As a few examples, assumptions are made regarding the rate of investment return on assets, percent of non-retired participants terminating employment, mortality probabilities for both retired and non-retired participants, and average retirement age among non-retired participants. When experience is, on the whole, financially favorable (for example, investment income is greater than assumed or participants are, on the average, retiring at an older age than anticipated, the fund realizes experience gains. The unfunded accrued liability is reduced by the full amount of the gain and the future contribution requirement is reduced by the amortization of the gain. The reverse, of course, is true if experience is unfavorable relative to the actuarial assumptions.

Since the use of realistic assumptions is an important element in the determination of cost projections, ERISA requires a certification, by an Enrolled Actuary, that the assumptions utilized in the valuation represent the actuary's "best estimate" of future experience under the Plan. The selection of assumptions which satisfy this test requires a periodic examination of past experience. An abridged analysis was performed for the year ended June 30, 1980 based

on the actuarial assumptions and benefit provisions reflected in the previous valuation.

* * *

[72]

D. SCHEDULED ACTUARIAL COST

On an overall basis, the Fund's experience during the year 1979-80 was such that on June 30, 1980, about 54% of the total accrued liability of \$104.8 million had been funded. The unfunded accrued liability decreased from \$59.5 million at the beginning of the year to \$47.9 million at the end of the year. A development of this change is given in Table 19.

Our income projection assumes that contributions will be received for an average of 1,475 hours per active employee (but in no event more than 8.0 million hours). The unfunded accrued liability is being amortized over a period of 26 years from July 1, 1980 in accordance with the latest schedule adopted by the Board of Trustees.

At the current contribution rate of \$1.00 per hour and the assumed level of employment activity, contributions will exceed the projected cost by 8.6¢ per hour. This comparison is shown below.

	Total Amount	Amount Per Active Employee	Equivalent Cents Per Hour	% of Gross Con- tributions
Normal Cost	\$3,668,700	\$ 551	\$.458	45%
Payment on unfunded accrued liability	3,427,900	514	.428	43
Administration ex- penses	225,000	34	.028	3
Projected Gross Cost	\$7,315,600	\$1,099	\$.914	91%
Expected Gross Contributions	8,000,000	1,201	1.000	100
Anticipated Margin	\$ 684,400	\$ 102	\$.086	9%

There is, of course, reason for concern whether it is appropriate to continue to assume a contribution base of 8.0 million hours. Like any other assumption, the projection of the contribution base must be reasonable for the future in the light of the plan's experience. Assuming a higher contribu-

tion base reduces the cost requirement, on the other hand a lower contribution base increases the Plan's cost.

[73] Pension costs can be sorted into two categories— variable and fixed. If covered employment goes down, the number of active employees and the amount of current benefit accrual is likely to decrease too, although perhaps not in exact proportion. Basically, that is a variable cost. On the other hand, pensions already earned are a fixed cost. So is any past benefit earned, and particularly to the extent that it is already vested. These costs have to be carried by the plan even if total covered employment and the number of active employees declines.

We look to the Trustees for guidance in settling on the appropriate assumption as to contribution base and number of active employees. The Trustees should advise us if they know of other developments or foreseeable changes that are relevant to a proper judgment as to the future contribution base.

* * *

[75]

E. VESTED LIABILITIES

The concept of unfunded vested liabilities has received substantial attention recently at most Board of Trustees' meetings as it relates to the recently enacted PBGC legislation. An employer withdrawing from the Plan after April 28, 1980 may have to be charged for withdrawal liability payments to the Plan. This is a new requirement of law, under the Multiemployer Pension Plan Amendments Act of 1980. The charge to any such withdrawn employer is a proration of the Plan's unfunded liability for vested benefits. At this time, the precise of definition of what the calculation of such liabilities involves is not clear. In any event, we have determined the lump sum present value of all vested accrued benefits under the plan payable at the assumed retirement ages. Should the Plan terminate on the valuation date, \$82.3 million would be needed to guarantee all vested participants their accrued pension payable at retirement.

	<u>Number of Employees</u>	<u>Vested Liabilities</u>
Pensioners and beneficiaries	2,446	\$35,539,800
Active-vested employees	1,990	34,736,300
Inactive-vested employees	857	12,014,200
Total	5,293	\$82,290,300
Fund Net Assets		56,896,400
Unfunded Vested Liability		\$25,393,900

As of July 1, 1980, therefore, the Fund's assets represented 69% of the vested liability. They were more than sufficient to pay off the pensioner's liability. A comparison between assets and vested liabilities for recent years is displayed in Table 20. It shows that an increasingly larger percentage of the vested liability has been funded by the end of each year.

The Board should keep in mind that these liabilities are based on the current valuation assumptions as to interest and mortality. The 5.50% interest assumption, which we feel is appropriate for long-term valuation of the Plan, would be overly conservative on a Plan termination basis. Additional calculations can be performed to show the effect of using higher interest rates (or PBGC assumptions) in the determination of the vested liabilities.

* * *

[77]

F. FUNDING STANDARD ACCOUNT

ERISA requires all Pension Plans to conform to its minimum funding standards. As a result, the Plan established a Funding Standard Account effective July 1, 1976. Each year the Plan's Enrolled Actuary must update the account which is, in effect, an actuarial accounting statement. The status of the account is reported on Schedule B of the Plan's Form 5500, the annual report to the IRS and Department of Labor. The Multiemployer Pension Plans Amendment Act of 1980, enacted September 26, 1980, imposes stricter funding requirements for future benefit changes.

The Funding Standard Account tests compliance with minimum funding standards. If the account balance at the

end of a given Plan Year is positive, then the Plan is being funded on a basis that meets the legal minimum.

Charges to the Funding Standard Account

Each year the account is charged with:

- (a) The normal cost for the Plan Year, including an allowance for operating expenses.
- (b) The amount necessary to amortize in equal installments:
 - (1) The July 1, 1976 unfunded liability over a period of 40 years.
 - (2) The net increase in the unfunded liability arising from Plan Amendments (if any) over a period of 40 years (revised by the new law to 30 years for amendments effective after September 26, 1980).
 - (3) The net experience loss (if any) over a period of 20 years (revised by the new law to 15 years for losses occurring after September 26, 1980).
 - (4) The net loss (if any) which results from changes in actuarial assumptions over a period of 30 years.

[78] *Credits to the Funding Standard Account*

Each year the account is credited with:

- (a) Employer Contributions (including those previously unreported).
- (b) The amount necessary to amortize in equal installments:
 - (1) The net decrease in the unfunded liability as a result of Plan Amendments (if any) over a 40-year amortization period (revised to 30 years for amendments effective after September 26, 1980).
 - (2) The net experience gain (if any) over a period of 20 years (revised to 15 years for gains occurring after September 26, 1980).
 - (3) The net gain (if any) as a result of changes in actuarial assumptions over a period of 30 years.

An experience loss (or gain) occurs if experience under the Plan is less favorable (or more favorable) than the actuarial assumptions. The loss (or gain) is determined on an aggre-

gate basis (gains and losses from investment experience, mortality, disability, etc. . . , are all combined to determine a net gain or loss).

All charges and credits are credited with interest, at the valuation rate, to the end of the year.

The charges and credits to this account for the year ended June 30, 1980 are shown in Table 21. As of July 1, 1980, there was a credit balance of \$8,750,700. Therefore, the Plan continues to comply with ERISA minimum funding standards. This reserve is carried forward for the following year. It may be drawn upon to meet charges to the account should contributions fall below the net charge in some future year.

The net charge for the year 1980-81 is shown below:

Normal cost*	\$3,893,700
Net amortization charge**	<u>3,515,000</u>
Net charge for year 1980-81	\$7,408,700

Taking the credit balance (\$8,750,700) into account, the minimum contribution requirement for the year 1980-81 is -0-.

*Includes administration expenses.

**From Exhibit III of the attached Actuarial Valuation Certificate.

[79] ERISA permits the Plan to establish its own funding policy, reflecting the Plan's particular circumstances and the Trustees' goals, so long as the Plan's funding basis is at least as conservative as the minimum funding standards.

We do not recommend funding the plan on the basis of the legal minimum. The minimum basis would allow a sort of "deficit financing"—a rate so low it might use up the credit balance and then be insufficient to keep up with the legal requirements thereafter. In other words, the minimum legal basis may not be good enough to provide financing through a stable rate.

While the legal funding requirement must always be met, the funding basis approved by the Trustees is more stable and generally more adequate to sustain the plan. In Section D the Plan's experience with regard to the funding policy established by the Trustees was discussed.

* * *

[82]

MARTIN E. SEGAL COMPANY

January 15, 1981

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND*Actuarial Valuation Certificate*

This is to certify that we have prepared an actuarial valuation of the Plan as of July 1, 1980.

The certificate contains the following attached exhibits:

- I: Actuarial Cost for Year Beginning July 1, 1980
- II: Actuarial Assumptions and Funding Method
- III: Funding Standard Account
- IV: Changes in Actuarial Assumptions
- V: Summary of Plan Provisions

The valuation was based on the assumption that the Plan was qualified for the year and on information supplied by the auditor with respect to contributions and assets and by the Administrator with respect to the data required on employees and pensioners.

To the best of my knowledge, the information supplied in this actuarial valuation is complete and accurate (except as may be noted in Exhibit I) and in my opinion the assumptions used in the aggregate: (a) are reasonably related to the experience of the Plan and to reasonable expectations; and (b) represent my best estimate of anticipated experience under the Plan.

MIGUEL A. PADRO, A.S.A., M.A.A.A.
ENROLLED ACTUARY NO. 147
ASSOCIATE ACTUARY

[83]

EXHIBIT I
ACTUARIAL COST FOR YEAR BEGINNING
JULY 1, 1980

The valuation was made with respect to the following data for 9,962 members (including 5,293 vested or retired) as of the valuation date (to be reported on Form 5500, Line 7):

a.	2,358	pensioners
b.	88	beneficiaries
c.	857	inactive—vested employees
d.	1,990	active—fully vested employees
e.	4,669	active—non-vested employees

The cost factors as of the valuation date are:

Normal Cost*	\$3,893,700
Accrued Liability:		
Active employees.....	\$57,260,900	
Inactive—vested employees	12,014,200	
Pensioners and Beneficiaries.....	35,539,800	
Total		104,814,900
Assets in the Fund**		56,896,400
Unfunded Accrued Liability		47,918,500
Present Value of Accrued Benefits:		
Pensioners and Beneficiaries.....	\$35,539,800	
Other vested participants	46,750,500	
All vested participants	\$82,290,300	
Non-vested participants	11,264,300	
Total		\$93,554,600

*Includes interest adjustment for payments made at the end of each month and allowance for administrative expenses (\$225,000).

**\$56,405,100 at Market Value

[84]

EXHIBIT II

ACTUARIAL ASSUMPTIONS AND FUNDING METHOD

Mortality rates: 1971 Group Annuity Table (with ages advanced one year).

Disability mortality before age 65: Assumed as age 65 in above Table.

Termination rates before retirement:

Age	Rate %			Total
	Death	Disability	Withdrawal	
20	.05	.05	7.90	8.00
25	.07	.05	7.68	7.80
30	.09	.05	7.18	7.32
35	.12	.06	6.23	6.41
40	.18	.09	5.08	5.35
45	.33	.18	3.82	4.33
50	.59	.40	2.22	3.21
55	.93	.85	.20	1.98
60	1.44	1.74	—	3.18
65	2.36	—	—	2.36
70	4.00	—	—	4.00

Retirement Age: For non-disability retirements: age 63, or completion of service requirement, if later.

Investment Return: 5.50% per annum.

Future Service Accrual Rate: 1.25 Benefit Unit per year.

Contribution Income: 1,475 hours per active employee

Administration expenses: \$225,000 per year.

Funding Method: Entry Age Normal Cost.

Valuation of Assets: At Adjusted Book Value*.

*Adjusted Book Value at beginning of year (increased by new money) written up/down by 20% of the difference between Market Value and this figure. The result must not be less than 80% nor greater than 120% of market value; otherwise, a further adjustment will be made.

[85]

EXHIBIT III
FUNDING STANDARD ACCOUNT FOR YEAR
ENDING JUNE 30, 1981

	<u>Charges</u>	<u>Credits</u>	<u>Accumulated Funding Balance</u>
1. Balance on July 1, 1980			\$8,750,700
2. Interest on Item (1)			481,300
3. Contributions for 1980-81			
4. Interest on Item (3)			
5. Normal Cost for 1980-81	\$3,893,700		
6. Interest on Item (5)	98,200		
7. Amortization payments	4,101,600	\$586,600	
8. Interest on Item (7)	103,400	14,800	
9. Total Items (1) through (8)	\$8,196,900		\$9,232,000
10. Net Addition to Funding Balance			
11. Total Funding Balance on 6/30/81			

The amortization payments (Item 7) were determined as follows:

				As of July 1, 1980		
Date Established	Original Period (in Years)	Type of Liability	Annual Payment	Years Remaining	Outstanding Balance	
Charges: 7/1/76	40	IL	\$3,117,600	36	\$49,644,100	
7/1/77	20	EL	74,800	17	833,000	
7/1/78	20	EL	22,800	18	262,800	
7/1/78	40	PA	438,600	38	7,105,000	
7/1/79	40	PA	191,300	39	3,123,200	
7/1/80	30	CA	256,500	30	3,820,900	
Total Amortization Charges			\$4,101,600		\$64,789,000	
Credits: 7/1/79	20	EG	\$ 102,900	19	\$ 1,224,200	
7/1/80	20	EG	117,300	20	1,436,900	
7/1/80	30	CA	3,200	30	47,900	
7/1/80	30	CA	363,200	30	5,410,800	
Total Amortization Credits			\$586,600		\$8,119,800	

Notes:

- (1) Contributions paid at the end of each month during the year.
- (2) Interest at 5.50% has been credited on all items (to the end of the year).
- (3) Items (5) and (7) are adjusted for payments made at end of each month.
- (4) Type of Liability: IL = Initial Liability; EL = Experience Loss; EG = Experience Gain; PA = Plan Amendment; CA = Change in Actuarial Assumptions.

[86]

EXHIBIT IV

CHANGES IN ACTUARIAL ASSUMPTIONS

1. *Interest Rate*: This assumption was [illegible] [probably "raised"] to 5.50% effective July 1, 1980.

2. *Future Service Accrual Rate*: The assumption was increased to 1.25 Benefit Units per year.

* * *

[92]

**[EXHIBIT C TO AFFIDAVIT OF THOMAS M. TRIPLETT]
The Pension Plan**

[Illustration Omitted in Printing]

**The Oregon-Washington
Carpenters-Employers
Pension Trust Fund**

**July 1, 1976
(Revised January 25, 1978)**

[93]

**Oregon-Washington
Carpenters-Employers
Pension Trust Fund**

309 S. W. Sixth Avenue
P.O. Box 3168
Portland, Oregon 97208
(503) 225-5650

BOARD OF TRUSTEES

Employer Trustees
Rychen Paddock (Chairman)
Carl M. Halvorson
Henry Hannan
V.A. Harding
Frank B. Hastie, Jr.

Employee Trustees
Harold G. Hansen (Co-Chairman)
Roy W. Coles
A. J. Darling
Allen W. Rettmann
Donald C. Staudenmier

Co-Legal Counsel:
Paul T. Bailey
John W. Hill

**Pension Consultant
and Actuary:**
Martin E. Segal Company

Administrator:
United States National Bank of Oregon

**Revised Pension Plan
for the
Oregon-Washington
Carpenters-Employers
Pension Trust Fund**

**As revised July 1, 1976 with second revision (including
amendments #1 and #2).**

This revised Pension Plan replaces the Prior Plan and is applicable only to pensions or other benefits which commence on and after July 1, 1976, as well as deferred vested benefits of former employees whose participation terminated prior to July 1, 1976 are to be determined under the Prior Plan.

ARTICLE 1. DEFINITIONS

Unless the context or subject matter otherwise requires, the following conditions shall govern in the Plan:

Section 1.01. "Building and Construction Industry" means all building and home construction and all heavy, highway and engineering construction and work of the type covered under the Collective Bargaining Agreement or work for the Union or a Local Union.

Section 1.02. "Collective Bargaining Agreement" means:

- a. The agreement by and between Employers and Union dated June 19, 1962.
- b. Any other collective bargaining agreement in the construction or closely related industry between Union, or any of its affiliated Local Unions, and any Employer, Signatory Association or Individual Employer which provides for the making of employer contributions to the Fund.
- c. Any extensions, amendments, modifications or renewal of any of the above described agreements, or any substitute or successor agreements to them which provide for the making of employer contributions to this Fund.

Section 1.03. "Contribution" means the payment made or to be made to the Fund by any Individual Employer under the provisions of the Collective Bargaining Agreement. The term "Contribution" shall also include any payment made or to be made on behalf of any employee-member of Union or a Local Union pursuant to regulations adopted by the Board of Trustees.

The term "Contribution" also means any payment made on behalf of an employee in a supervisory capacity by an Individual Employer pursuant to regulations adopted by the Trustees. The term "Contribution" also means any pay-

ment made on behalf of an employee of any jointly administered trust fund established pursuant to the Collective Bargaining Agreement in accordance with regulations adopted by the Trustees.

Section 1.04. Prior to July 1, 1976, "Contributory Hours" means compensable hours of Covered Employment for which Contributions are [94] made to the Fund. After June 30, 1976, "Contributory Hours" means compensable hours of Covered Employment for which Contributions are made or are required to be made to the Fund.

Section 1.05. "Covered Employment" means work as an Employee as defined in Section 1.06.

"Continuous Non-Covered Employment" means employment for a Contributing Employer after July 1, 1976 in a job not covered by this Plan which is continuous with a Participant's Covered Employment with the same Contributing Employer. A period of Non-Covered Employment will be considered to be continuous with Covered Employment only if there is no quit, discharge, or other termination of employment between the period of Covered and Non-Covered Employment.

Section 1.06. "Employee" means any employee of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement and any employee-member of Union or a Local Union on whose behalf Contributions are made to the Fund pursuant to regulations adopted by the Board of Trustees. The term "Employee" also means an employee employed by an Individual Employer in a supervisory capacity who had earned Credited Service under this Pension Plan at any time prior to his employment in a supervisory capacity, pursuant to regulations adopted by the Trustees. The term "Employee" also means employees of any jointly administered trust fund established pursuant to the Collective Bargaining Agreement in accordance with regulations adopted by the Trustees.

The term "Employee" does not include any self-employed person, whether a sole proprietor or a partner.

Section 1.07. "Employers" means the following associations which are parties to the Trust Agreement: Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.; Eugene Contractors Association; Associated Interior Contractors of Oregon and Southwest Washington, Inc.; Home Builders Association of Metropolitan Portland (formerly known as Portland Home Builders Association); Southwest Washington Contractors Association, Inc. (formerly known as Vancouver Contractors Association).

An Employer shall not be deemed a Contributing Employer simply because it is part of a controlled group of corporations (within the meaning of Section 1563(a) of the Internal Revenue Code, determined without regard to Section 1563(a)(4) and (e)(3)(C), or of [sic] a trade or business under common control within the meaning of Section 414(c) of the Internal Revenue Code), some other part of which is a Contributing Employer.

Section 1.08. "Hour of Service" means each hour for which an Employee is directly or indirectly paid or entitled to payment by a Contributing Employer after July 1, 1962 for performance of duties during a Plan Credit Year, including hours for which back pay may be awarded or agreed to by a Contributing Employer, and for each hour during a Plan Credit Year for which the Employee is directly or indirectly paid or entitled to payment on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) because of vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. Notwithstanding the foregoing, no more than 501 hours of service will be credited to an Employee on account of any single continuous period during which the Employee performs no duties (whether or not such period occurs in a single Plan Credit Year). (Two periods of non-work time shall be deemed continuous if they are compensated for the same reason and are not separated by at least 90 days). An Employee will not receive hour-of-service credit under the foregoing if the payment is made or due under a plan maintained solely for the purpose of complying with applicable workman's compensation or unemployment compensation

or disability insurance laws, or if the payment solely reimburses an Employee for medical or medically related expenses incurred by the Employee. Irrespective of the foregoing, an Employee is not required to be credited on account of a period during which no duties are performed with a number of hours of service which is greater than the number of hours regularly scheduled for the performance of duties during such period.

Section 1.09. "Individual Employer" or "Contributing Employer" means an (1) employer who is required by the Collective Bargaining Agreement to make Contributions to the Fund, or who does in fact make one or more Contributions to the Fund, (2) the Union and Local Unions which make Contributions to the Fund on behalf of employee-members pursuant to regulations adopted by the Board of Trustees, and (3) a jointly administered trust fund established pursuant to the Collective Bargaining Agreement which makes Contributions to the Fund on behalf of its employees in accordance with regulations adopted by the Trustees.

Section 1.10. "Normal Retirement Age" means age 65 or, if later, the age of the Participant on the tenth anniversary of his participation. Participation before a Permanent Break in Service shall not be counted.

Section 1.11. "Participant" means a Pensioner, Beneficiary, or an Employee who meets the requirements for participation in the Plan as set forth in Article 2, or a former Employee who has attained Vested Status under this Plan. A Beneficiary is a person (other than an Employee or a Pensioner) who is receiving benefits under this Plan because of his or her designation for such benefits by a Pensioner or Participant. A "Vested Participant" is an Employee who qualifies for a Vested Pension in accordance with the provisions of Section 3.13.

Section 1.12. "Pensioner" means a person to whom a pension is being paid under this plan or to whom a pension plan would be paid but for the time required for administrative processing.

Section 1.13. "Plan" means this Pension Plan and any modification, amendment, extension or renewal thereof.

Section 1.14. "Plan Credit Year" means the twelve-month period from July 1 of any year through June 30 of the following year. For purposes of ERISA regulations the Plan Credit Year shall serve as the vesting computation period and benefit accrual computation period and beginning with the Plan Credit Year during the initial period of employment, the computation period for eligibility to participate in the Plan.

Section 1.15. "Plan Year" means the Trust Fund's fiscal year, the twelve-month period from July 1 of any year through June 30 of the following year.

Section 1.16. "Prior Plan" means the Pension Plan adopted July 1, 1976 and all amendments or modifications thereto effective prior to July 1, 1976.

[95] Section 1.17. "Signatory Association" means any employer organization, other than Employers, which signs the Trust Agreement on behalf of its members or executes on behalf of such members a written acceptance of the agreement to be bound by the terms of the Trust Agreement.

Section 1.18. "Trusts," "Trust Fund" or "Fund" means the trust fund created and established by the Trust Agreement, including any insurance policies, monies, investments and other assets held under the Trust Agreement.

Section 1.19. "Trust Agreement" means the Trust Agreement dated December 19, 1962, establishing the Oregon-Washington Carpenters-Employers Pension Trust Fund and any modification, amendment, extension or renewal thereof.

Section 1.20. "Trustees" or "Board of Trustees" or "Board" means the Board of Trustees established by the Trust Agreement.

Section 1.21. "Union" means the following union entities which are parties to the Trust Agreement: Oregon State Council of Carpenters (affiliated with United Brotherhood of Carpenters & Joiners of America). Portland & Vicinity District Council of Carpenters, Southwest Washington District Council of Carpenters, UB of C & J of A, Piledrivers, Bridge, Dock & Wharf Builders, UB of C & J of A, and their respective successors and assigns.

Section 1.22. "Year of Participation" means, for purposes of compliance with Regulation 2530 of the Department of Labor, a Plan Credit Year after June 30, 1976 in which a Participant has completed 2,000 hours of service in Covered Employment.

Section 1.23. Other terms are specifically defined as follows:

Term	Section(s)
a. ERISA	2.01
b. Regular Pension	3.02 and 3.03
c. Early Retirement Pension	3.04 and 3.05
c. Disability Pension	3.06 and 3.07
e. Deferred Vested Pension	3.13 and 3.14
f. Pro Rata Pension	4.08 and 4.09
g. Partial Pension	5.05 and 5.08
h. Years of Credited Service	
Credited Past Service	6.02
Credited Future Service	6.03
i. Benefit Units	6.04
j. Break in Service	
(One-Year Break in Service, Permanent Break in Service)	6.05
k. Separation from Covered Employment .	6.06
l. Husband-and-Wife Pension	7.01
m. Effective Date of Pension	9.05
n. Retired or Retirement	9.08

* * *

[104] Section 9.11. Nonforfeitability and Vested Status.

- a. The Employee Retirement Income Security Act requires that certain of the benefits under this Plan be nonforfeitable.
- b. A Participant acquires a nonforfeitable right to a Regular Pension or Vested Pension at Normal Retirement Age after completion of ten Years of Service ("Years of Service" as used in this section means those years of service required to be credited in accordance with Section 411 of the Internal Revenue Code and Section 203 of ERISA and as further defined by the applicable regulations.) Periods of service and breaks in service are de-

fined for that purpose under this Plan on the basis of all hours of service.

- c. ERISA also provides certain limitations on any plan amendment that may change the plan's vesting schedule. In accordance with those legal limitations, no amendment of this plan may take away a Participant's nonforfeitable right to a Regular Pension at Normal Retirement Age, if he has already earned it at the time of the amendment. If an amendment changes the schedule on the basis of which a Participant acquires such a right, any Participant who has at least five Years of Service at the time the amendment is adopted or effective (which-ever is later) will achieve such a nonforfeitable right on the basis of the pre-amendment schedule which results in the earliest nonforfeitable right.

While this Plan provides Regular Pensions, Vested Pensions, Early Retirement Pensions, Disability Pensions, Pro-Rata Pensions and Partial Pensions on the basis of requirements that may be met by some Participants who have not completed 10 Years of Service, such eligibility rules represent provisions of the Plan above and beyond those which are required by law to be nonforfeitable.

* * *

[105] **ARTICLE 10. MISCELLANEOUS**

Section 10.01. Non-Reversion. It is expressly understood that in no event shall any of the corpus or assets of the Trust Fund revert to the employers or be subject to any claims of any kind or nature by the Employers, except for the return of an erroneous contribution within the limits prescribed by law.

Section 10.02. Gender. Wherever any words are used in this Pension Plan in the masculine gender, they should be construed as though they were also in the feminine gender in all situations where they would so apply; wherever any words are used in this Pension Plan in the singular form, they should be construed as though they were also in the plural form in all situations where they would so apply, and vice versa.

Section 10.03. Limitation of Liability. This Pension Plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the plan on a permanent basis, fulfilling the funding requirements of ERISA. Except for liabilities which may result from provisions of ERISA, nothing in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union.

There shall be no liability upon the Trustees individually, or collectively, or upon the Union to provide the benefits established by this Pension Plan, if the Pension Trust does not have assets to make such payments.

Section 10.04. Addition of New Groups of Employees. The Trustees shall review the relevant actuarial data with respect to any group of employees added to the coverage of this Trust Fund. If the Trustees conclude that modification of previously adopted funding assumptions or changes in the amounts of pension benefits hereunder would result from the inclusion of such group, the appropriate provisions of the Pension Plan shall be modified with respect to the group involved so that the Trust will not be adversely affected by the inclusion of such group for coverage hereunder.

Section 10.05. Terminated Employer. If an Employer terminates its participation in the Trust with respect to a bargaining unit, the Trustees are empowered to reduce or cancel any obligation of the Trust with respect to that part of any pension for which a person was made eligible because of employment in such bargaining unit prior to the contribution date with respect to that unit. Neither the Board, the remaining Contributing Employers, nor the Union shall be obliged to make such payments.

* * *

[112] OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND
REVISED PENSION PLAN
(Amended and Restated Effective July 1, 1976)

SIXTH AMENDMENT

This amendment is made and entered into effective April 29, 1980, by the Board of Trustees of the Oregon-Washington Carpenters-Employers Pension Trust Fund ("Trust Fund").

WHEREAS the Board of Trustees first established the Trust Fund Pension Plan effective December 19, 1962, and

WHEREAS the Pension Plan was last amended and restated effective July 1, 1976, and was last amended effective December 1, 1980, and

WHEREAS the Board of Trustees desires to further amend the Plan pursuant to Section 11.01 thereof to adopt certain optional rules provided in the Multiemployer Pension Plan Amendments Act of 1980,

NOW, THEREFORE, the Oregon-Washington Carpenters-Employers Pension Trust Fund Revised Pension Plan is hereby amended effective April 29, 1980, to add a new Article 12 thereto as follows:

ARTICLE 12

EMPLOYER WITHDRAWAL LIABILITY

Section 12.01. Compliance with Multiemployer Act. The following provisions are designed to comply with those sections of the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act") and the regulations thereunder which require that certain optional provisions of the Multiemployer Act be set forth in the Plan. To the extent that an optional provision is not adopted, the presumptive provisions of the Multiemployer Act shall apply.

Section 12.02. Denominator Exclusion. Only the contributions of "significant withdrawn employers" shall be excluded from the denominators of withdrawal liability fractions described in ERISA Section 4211(b) or (c). A "significant withdrawn Employer" is:

[113] a. An Employer to whom the Plan has sent a notice of withdrawal liability under ERISA Section 4219; or

b. A withdrawn Employer that in any Plan Year used to determine the denominator of a withdrawal liability fraction contributed at least \$250,000 or, if less, 1 percent of all contributions made by Employers for that Plan Year; or

c. A group of Employers if they withdraw in a "concerted withdrawal." A "concerted withdrawal" means a discontinuance of contributions to the Plan during a single Plan Year:

(1) by an employer association;

(2) by all or substantially all of the Employers covered by a single collective bargaining agreement; or

(3) by all or substantially all of the Employers covered by agreements with a single labor organization.

Section 12.03. The sum of all contributions made and the total amount contributed by Employers for a Plan Year include contributions received during the first month of the following Plan Year and also include contributions received during the second month of the following Plan Year that relate to Plan Years prior to the Plan Year in which made.

Section 12.04. Annual Withdrawal Liability Payment. In calculating the amount of each annual withdrawal liability payment for the July 1, 1979, through June 30, 1980, Plan Year, the average annual number of withdrawing Employer contribution base units and the highest contribution rate at which such Employer had an obligation to contribute shall be determined based on a five Plan Year period. That period shall be increased by one year for each succeeding Plan Year until the number ten is reached.

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT PENSION BENEFIT
GUARANTY CORPORATION'S CROSS-MOTION FOR
SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

[Caption Omitted in Printing]

STATEMENT OF PROCEEDINGS

This is an action for a declaratory judgment that certain provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (September 26, [2] 1980) (the "Multiemployer Act"), 29 U.S.C.A. § 1001, *et seq.* (Supp. 1981), are unconstitutional and unenforceable, and for a permanent injunction against enforcement of those provisions.

On September 29, 1981, R.A. Gray & Co. ("Gray") filed its Complaint for Declaratory Judgment and Other Relief, its Application for Preliminary Injunction and for Order to Show Cause, and its Points and Authorities in Support thereof. On October 23, 1981, Gray served its Memorandum in Support of Temporary Restraining Order and Preliminary Injunction (hereinafter, "Gray First Brief") and the Affidavit of John R. Bentley (hereinafter referred to as "Bentley Aff."), Gray's Secretary-Treasurer. The same day, defendant Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust") filed its Memorandum in Opposition to Plaintiff's Application for Injunctive Relief and its Motion for Summary Judgment, with a supporting memorandum and an affidavit of Dolores Taylor ("Taylor Aff."), fund manager for the Trust.

On October 30, 1981, defendant Pension Benefit Guaranty Corporation (the "PBGC") served its Statement of Reasons and Authorities in Opposition to Gray's Motions for Temporary Restraining Order and Preliminary Injunction. On November 6, 1981, Gray served its Motion for Summary Judgment and on November 10 served its Reply Memorandum on Motions for Preliminary Relief and Memorandum in Support of Motion for Summary Judgment (hereinafter, "Gray Second Brief"). On November 16, 1981, Gray's attorney [3] in this action executed an affidavit (hereinafter

"Triplett Aff."). Attached to the Triplett Aff. as exhibits are copies of two actuarial valuations of the Trust, a copy of the Plan, including amendments Three through Six to the Plan, and a copy of the Revised Sixth Amendment to the Trust Agreement for the Trust, made on September 13, 1979. (The Triplett Aff. was actually filed and served on April 6, 1982.)

At the conclusion of the hearing on November 16, 1981, the court entered an order denying Gray's motion for preliminary injunction, and advised the parties of a forthcoming opinion. On November 19, Gray served a motion for reconsideration of this order, which was denied on November 20, 1981. On December 1, 1981, the court issued its opinion and order denying the motion for preliminary injunction.

In its December 1 opinion, the court noted that at least one issue in the action—whether Gray had withdrawn from the pension plan involved here—was "particularly appropriate for resolution through the arbitration process" required by the Multiemployer Act. Slip Op. at 7 (D. Ore., December 1, 1981). Accordingly, the court concluded that the motions for summary judgment were not ripe for decision at that time. If Gray did not request arbitration, the motions for summary judgment would be ruled on after additional briefing of the constitutional issues. *Id.* To give Gray time to consider its options, the court set the next status hearing for February 16, [4] 1982. PBGC's answer to the complaint was filed on December 4, 1981; the Trust has not filed an answer.

At the February 16, 1982 status hearing, Gray's counsel agreed that he was "going to accept the trustees' findings," with regard to the fact of Gray's withdrawal, the date of the withdrawal, and "the appropriateness of the action of the actuary in determining the total withdrawal liability and the allocations of that liability to my client." Exhibit 1 (Transcript of Hearing in Chambers, February 16, 1982) at 84. Further, Gray's counsel stated "[i]n any event, it appears to me that there is therefore no need to arbitrate because the fact findings, we are prepared to adopt." *Id.* at 84-85. In response to an inquiry from counsel for the Trust regarding the "procedural" aspects of arbitration, Gray's

counsel stated "we are not at this point questioning the arbitration process, nor are we questioning the process by which fact determinations were made, even though they might have been an unconstitutional process. . . ." *Id.* at 86.

At the conclusion of the status hearing, the court scheduled the filing of briefs on the motions for summary judgment. The PBGC now files the instant memorandum with attached exhibits and its cross-motion, seeking summary judgment in its favor and against the plaintiff, on the grounds that the Multiemployer Act is constitutional in all challenged respects.

[5] STATEMENT OF FACTS

The undisputed, material facts, *see* Rule 56(c), Fed. R. Civ. P., are set forth on the following pages 5 through 13.

The parties.

Defendant Trust is a trust organized under the laws of the United States and the state of Oregon. The Trust was established effective July 1, 1962 pursuant to a Trust Agreement dated December 19, 1962, as amended from time to time. (A copy of the full Amended Trust Agreement, made August 1, 1968, is attached hereto as Exhibit 2, and is incorporated by reference herein. A copy of the September 13, 1979 amendment to the Trust Agreement has been filed in this action as Triplett Aff., pp. 114-19, and is incorporated by reference herein.) The Trust is administered pursuant to the Revised Pension Plan for the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Plan").

The Trust Agreement provides in relevant part as follows:

The liability of any Individual Employer to the Fund, or with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement or Trust Agreement The Individual Employer shall not be required to make any further contributions to the cost of operation of the Fund or of the Plan, except as herein elsewhere provided. *This section shall only apply to the extent permitted by law.*

[Trust Agreement, Art. II, § 6 (Exhibit 2 at 95) (emphasis added).]

[6] Section 7 of the Trust Agreement contains a similar clause: "*To the extent permitted by law, [none] of the Employers, any Signatory Association [nor] any Individual Employer . . . shall be liable or responsible for any debts, liabilities or obligations of the Fund or of the Trustees.*" (Exhibit 2 at 95-96 (emphasis added).)

The Plan was revised July 1, 1976 and has been amended six times since then. (A copy of the revised Plan and its amendments has been filed in this action as Triplett Aff., pp. 92-106, and is incorporated by reference herein.) The Plan is a multiemployer defined benefit pension plan within the meaning of Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Act, 29 U.S.C.A. § 1301(a)(3) (Supp. 1981). Section 10.03 of the Plan provides in pertinent part as follows:

Section 10.03. Limitation of Liability. This pension plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the plan on a permanent basis, fulfilling the funding requirements of ERISA. *Except for liabilities which may result from provisions of ERISA*, nothing contained in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union. . . . [Triplett Aff. at 105 (emphasis added).]

The Plan primarily covers employees in the building and construction industry. See Trust Multiemployer Act "Compliance [7] Policy, July 28, 1981" (attached hereto as Exhibit 3 and incorporated by reference herein) at 107, 111 (hereinafter referred to as "Compliance Policy"). Substantially all of the employees with respect to whom Gray had an obligation to contribute under the Plan were performing work in the building and construction industry, and the Plan primarily covers employees in that industry. Exhibit 3 at 107. The Plan is therefore a building and construction industry

plan within the meaning of Section 4203(b) of ERISA, 29 U.S.C.A. § 1383(b).

The trustees of the Trust are the plan sponsor of the Plan within the meaning of Section 4001(a)(10) of ERISA, 29 U.S.C.A. § 1301(a)(10) (Supp. 1981). Pursuant to Article III, Section 1 of the Trust Agreement, the Trust is administered by the Board of Trustees consisting of five trustees representing employers and five trustees representing employees. (Exhibit 2 at 96.)

Gray is an employer within the meaning of Title IV of ERISA. Pursuant to successive collective bargaining agreements, in particular the July 23, 1968 Short Form Agreement with the Oregon State Council of Carpenters (the "State Union") (Bentley Aff. at 5) and Article XV of the 1975-1980 Carpenters Master Labor Agreement (Bentley Aff. at 13), Gray made contributions to the Trust to finance the pension benefits provided by the Plan. (Copies of the July 23, 1968 Short Form Agreement and the 1975-1980 Carpenters Master Labor Agreement have been filed in this action as Bentley Aff. at 5 and Bentley Aff. [8] at 6-19, respectively and are incorporated by reference herein.) The Carpenters Master Labor Agreement was executed by the Oregon-Columbia Chapter, Associated General Contractors of America, Inc. (the "Employer Association") and the Oregon State and Southwest Washington District Councils of the United Brotherhood of Carpenters and Joiners of America (the "National Union"). Gray's employees were represented for collective bargaining purposes by several Union locals which are members of the Portland and Vicinity District Council of Carpenters (the "Local").

Defendant PBGC, created by Section 4002(a) of ERISA, 29 U.S.C. § 1302(a) (1976), is a United States corporation responsible for the administration and enforcement of Title IV of ERISA *as amended by the Multiemployer Act*, 29 U.S.C.A. §§ 1301-1461, 1303(e)(1) (Supp. 1981).

The employer withdraws from the Plan.

On or about February 14, 1980, Gray notified the State Union that, effective June 1, 1980, Gray was terminating

its collective bargaining agreement with the National Union. Gray and the Local filed unfair labor practice charges against each other with the National Labor Relations Board as a result of events occurring in connection with Gray's termination of the labor contract. The Local charged Gray with an unfair labor practice in distributing letters to its employees suggesting they could reduce their involvement with the Local. Thereafter, [9] the Local began picketing Gray in order to obtain recognition and to publicize the unfair labor practice charges. The recognitional picketing continued through at least November 1981. Gray charged that the Local unlawfully fined and disciplined some union members for allegedly crossing the picket line established at Gray's work sites. The NLRB has declined to issue complaints in response to Gray's charges. (Copies of the unfair labor practice charges filed by Gray against the Local, and associated documents, are attached hereto as Exhibit 4, pp. 165-85, and incorporated by reference herein.)¹

In addition to filing countercharges based on alleged unfair labor practices, Gray and the State Union corresponded about Gray's proposals for a labor agreement. Exhibit 4 at 139, 140, 154, 156, 160-67. In particular, Gray proposed changes in pension and vacation benefits, Exhibit 4 at 162, and a unilateral wage increase, *id.* at 166, 167. Gray's negotiations with a related union had reached an "impasse," *id.* at 166, regarding "subcontractor and union security clauses," *id.* at 140, 166. Similar obstacles to agreement between Gray and the State Union arose, *id.* at 166. Consequently, Gray implemented its unilateral proposals, albeit "without prejudice to such agreement as future negotiations may produce." [10] Exhibit 4 at 162. Following the termination of its collective bargaining agreement and the break-down in negotiations, Gray's work force became essentially non-union. Exhibit 4 at 139, 153, 154, 165.

¹ These charges and related documents were reviewed by the Board of Trustees, and form part of the record of the Trustees' "Decision on Review," Exhibit 4, pp. 137-59, discussed *infra* at pp. 11-12.

The Plan sponsor assesses liability.

In a letter dated July 24, 1981, the trustees of the Trust caused the Trust's fund manager to notify Gray, pursuant to Sections 4202 and 4219(b)(1) of ERISA *as amended*, 29 U.S.C.A. §§ 1382, 1399(b)(1), that Gray had withdrawn from the Plan and had incurred a withdrawal liability of \$201,359. Taylor Aff.; PBGC's Statement of Reasons and Authorities in Opposition to Motions for Temporary Restraining Order and Preliminary Injunction (hereinafter referred to as "PBGC Preliminary Brief") at Exhibit 1. The July 24, 1981 notice of liability stated that Gray ceased to have an obligation to contribute to the Trust on or about June 1, 1980, and consequently withdrew from the Plan in a complete withdrawal as defined in Section 4203 of ERISA, 29 U.S.C.A. § 1383. The notice also set forth a schedule of quarterly payments of withdrawal liability and demanded payment in accordance with the schedule.

In an August 6, 1981 letter, Gray's counsel raised several questions concerning Plan rules and amendments and requested copies of actuarial valuations of the Trust. PBGC Preliminary Brief at Exhibit 2. By letter dated September 3, 1981, counsel for the Trust supplied some of the documents and information [11] requested, and made the actuarial valuations available for inspection. PBGC Preliminary Brief at Exhibit 3. By letter dated September 16, the Trust's counsel provided copies of the actuarial valuations to Gray. *Id.*, Exhibit 5. (The actuarial valuations have been filed in this action as Exhibits A and B to the Triplett Aff.)

Subsequently, in a letter dated September 25, 1981, the Trust informed Gray that it was delinquent in its quarterly payment of withdrawal liability and that it would be in default if it did not cure its failure to pay within 60 days. *Id.*, Exhibit 6.

The employer requests review.

Finally, in a letter dated October 12, approximately two weeks after filing Gray's complaint in this action, counsel for Gray formally requested review of the Plan sponsor's determinations pursuant to Section 4219(b)(2)(A) of ERISA, 29 U.S.C.A. § 1399(b)(2)(A). This request for re-

view preserved Gray's opportunity to arbitrate its dispute with the Plan. PBGC Preliminary Brief at Exhibit 7. Subsequently, the Board of Trustees of the Trust issued its "Decision on Review" concerning Gray's withdrawal liability, pursuant to Section 4219(b)(2)(B). (A copy of the "Decision on Review," along with the Trustees' "Abstract of Record," is attached hereto as Exhibit 4, pp. 137-59, and incorporated by reference herein.)

[12] In its Decision on Review, the Board of Trustees made several fact determinations, none of which are disputed by any party for the purposes of the instant summary judgment proceeding. Exhibit 1 at 84, 84-85. The following are among the most important fact-findings by the Plan sponsor:

1. "Gray did not withdraw from the ... Plan solely because of a suspension of contributions during a 'labor dispute,'" within the meaning of Section 4218(2) of ERISA, 29 U.S.C.A. § 1398(2) (Exhibit 4 at 137);

2. the Plan sponsor selected a proper method for allocating unfunded vested benefits to Gray (Exhibit 4 at 141);

3. the schedule of payments offered to Gray is appropriate (Exhibit 4 at 143);

4. the actuarial determination of the amount of the Plan's unfunded vested benefits is accurate (Exhibit 4 at 147);

5. a transfer of assets and liabilities from the Plan to the single-employer plan established by Gray may be appropriate but should be delayed pending issuance of PBGC regulations on that topic (Exhibit 4 at 149); and,

6. the date of Gray's withdrawal was June 1, 1980, and the cessation of Gray's obligation to contribute to the Trust was permanent by no later than June 20, 1980 (Exhibit 4 at 152).

Following receipt of the Plan sponsor's decision, Gray had a 60-day period under the statute in which it could have [13] initiated arbitration of its disputes with the Plan sponsor. Section 4221(a)(1)(A) of ERISA, 29 U.S.C.A. § 1401(a)(1)(A). Gray, however, waived its right to seek arbitration. Exhibit 1 at 84-85.

Gray has not paid any of its withdrawal liability and continues to refuse to pay on the schedule established by the trustees.

* * *

[93]

[Exhibit Two to PBGC Memorandum of
Points and Authorities]

**OREGON-WASHINGTON
CARPENTER-EMPLOYERS
PENSION TRUST FUND**

BOARD OF TRUSTEES

Employer Trustees

Carl M. Halvorson
Henry Hannan
V. A. Harding
Frank B. Hastie, Jr.
Rychen Paddock

Employee Trustees

Roy Coles
A. J. Darling
Harold Hansen
Allen W. Rettmann
Donald C. Staudenmier

CO-LEGAL COUNSEL

Bailey, Doblle & Bruun
Miller, Anderson, Nash,
Yerke & Wiener

CONSULTANTS AND ACTUARIES

Martin E. Segal Company

AUDITOR

Touche Ross & Co.

FUND MANAGER

United States National Bank of Oregon
P.O. Box 3168, Portland, Oregon 97208

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**TRUST AGREEMENT
OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION
TRUST FUND**

This amended Trust Agreement Last Made and Entered into as of the 1st day of August, 1968, and last amended July 1, 1976, by and between OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., EUGENE CONTRACTORS ASSOCIATION, ASSOCIATED INTERIOR CONTRACTORS OF OREGON AND SOUTHWEST WASHINGTON, INC., HOMEBUILDERS ASSOCIATION OF METROPOLITAN PORTLAND, formerly known as PORTLAND HOME BUILDERS ASSOCIATION, SOUTHWEST WASHINGTON CONTRACTORS ASSOCIATION, INC. formerly known as VANCOUVER CONTRACTORS ASSOCIATION, and certain contractor associations of Oregon and Southwest Washington, which may become signatory hereto, acting for and on behalf of their members and hereinafter referred to as "Employers", and the OREGON STATE COUNCIL OF CARPENTERS, PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS, SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS, PILEDRIVERS, BRIDGE, DOCK AND WHARF BUILDERS of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA who are signatories to the hereinafter mentioned Collective Bargaining Agreement, acting for and on behalf of the local unions listed therein, hereinafter referred to as "Union", recites and provides as follows:

WITNESSETH:

WHEREAS, Portland Chapter, The Associated General Contractors of America, Inc., (Heavy and Highway Division), and Portland Chapter, The Associated General Contractors of America, Inc., (Building Division), Portland Home Builders Association, Vancouver Contractors Association, Longview-Kelso Contractors Association, Eugene Contractors Association, Willamette General Contractors Association, Lower Columbia Contractors Association, Interior Builders Association and certain contractor associa-

tions of Oregon and Southwest Washington, which may become signatory hereto, acting for and on behalf of their members and the Oregon State Council of Carpenters (affiliated with United Brotherhood of Carpenters & Joiners of America), Portland & Vicinity District Council of Carpenters and Southwest Washington District Council of Carpenters UB of C & J of A, who are signatories to the hereinafter mentioned Collective Bargaining Agreement, acting for and on behalf of the local unions listed therein and Local No. 1342 of the Southwest Washington Council of Carpenters, UB of C & J of A, and Local No. 2416, Local No. 2419, Local No. 1036, Local No. 1223 and Local No. 1879 of the Piledrivers, Bridge, Dock & Wharf Builders, UB of C & J of A, who are also signatories to the hereinafter mentioned Collective Bargaining Agreement, entered into an Agreement on the 19th day of December, 1962, and

WHEREAS, Lower Columbia Contractors Association, Willamette General Contractors Association, Longview-Kelso Contractors Association have been dissolved, and

WHEREAS, Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., has become the successor to Portland Chapter, The Associated General Contractors of America, Inc. (Heavy and Highway Division), and Portland Chapter, The Associated General Contractors of America, Inc. (Building Division) and

WHEREAS, Interior Builders Association has ceased to act as a collective bargaining agent for any of its members in dealing with Union and has notified all parties to the Trust Agreement that it withdraws as a signatory party hereto, and

WHEREAS, Acoustical Contractors Association of Oregon, Inc., has changed its name as a result of merger to Associated Interior Contractors of Oregon and Southwest Washington, Inc., and

WHEREAS, Portland Home Builders Association has changed its name to Home Builders Association of Metropolitan Portland, and

WHEREAS, Vancouver Contractors Association has changed its name to Southwest Washington Contractors Association, Inc., and

WHEREAS, the parties hereto amended the original Trust Agreement as of January 1, 1971, January 1, 1975, March 25, 1975, and July 1, 1976, so as to read as set forth herein:

This Trust agreement, made and entered into as of the 19th day of December, 1962, by and between OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; LONGVIEW-KELSO CONTRACTORS ASSOCIATION; EUGENE CONTRACTORS ASSOCIATION; PORTLAND HOME BUILDERS ASSOCIATION; VANCOUVER CONTRACTORS ASSOCIATION; INTERIOR BUILDERS ASSOCIATION and certain contractor associations of Oregon and Southwest Washington; which may become signatory hereto acting for and on behalf of their members and hereinafter referred to as "Employers", and the OREGON STATE COUNCIL OF CARPENTERS; PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS; SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS; PILEDRIVERS, BRIDGE, DOCK AND WHARF BUILDERS of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA who are signatories to the hereinafter mentioned Collective Bargaining Agreement, acting for and on behalf of the local unions listed therein, hereinafter referred to as "Union", recites and provides as follows:

(1) The above-mentioned parties are parties to a Collective Bargaining Agreement which provides for employer contributions of a certain sum per hour for each compensable hour worked by employees under such agreement to a trust fund for the purpose of providing a Pension Plan for all eligible employees covered by such Agreement.

(2) The parties have agreed that such contributions shall be payable to and be deposited in the Trust Fund created and established by this Trust Agreement.

(3) The purpose of this Trust Agreement is to provide for the establishment of such Trust Fund and for the maintenance of such Plan in the manner hereinafter set forth.

NOW, THEREFORE, This Agreement Witnesseth:

That in consideration of the premises, in order to create said trust to be known as the Oregon-Washington Carpenters-Employers Pension Trust Fund, it is mutually understood and agreed as follows:

ARTICLE I

Definitions

Unless the context or subject matter otherwise requires, the following definitions shall govern in this Trust Agreement:

Section 1. Collective Bargaining Agreement:

a. The agreement by and between Employers and Union dated June 19, 1962.

b. Any other collective bargaining agreement in the construction or closely related industry between Union, or any of its affiliated Local Unions, and any Employer, Signatory Association or Individual Employer which provides for the making of employer contributions to the Fund.

c. Any extensions, amendments, modifications, supplementations or renewals of any of the above-described agreements, or any substitute or successor agreements to them which provide for the making of employer contributions to this Fund.

Section 2. Contribution:

The payment made or to be made to the Fund by any Individual Employer under the provisions of the Collective Bargaining Agreement. [95] The term "Contribution" shall also include any payment made or to be made on behalf of any employee-member of Union or a Local Union or on behalf of an employee in a supervisory capacity.

Section 3. Employee:

Any employee whether union or non-union of an Individual Employer who performs one or more hours of work of the type covered by the Collective Bargaining Agreement, any employee-member of Union or a Local Union, any supervisor who formerly performed work of the type covered by the Collective Bargaining Agreement and who supervises such employees and those employees of this Fund and any other jointly administered trust fund established pursuant to the Collective Bargaining Agreement who, by res-

olution duly adopted by the Board of Trustees of the employing Trust Fund, are specifically designated to receive the benefits set forth in this Trust Agreement.

Section 4. Employer:

The following associations which are parties to this Trust Agreement: OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; LONGVIEW-KELSO CONTRACTORS ASSOCIATION; EUGENE CONTRACTORS ASSOCIATION; PORTLAND HOME BUILDERS ASSOCIATION; VANCOUVER CONTRACTORS ASSOCIATION; INTERIOR BUILDERS ASSOCIATION; and certain other associations of contractors that may become signatories hereto and their respective successors and assigns.

Section 5. Individual Employer:

An employer who is required by the Collective Bargaining Agreement to make contributions to the Fund, Union and Local Unions who employ employee-members.

Section 6. Signatory Association:

Any employer organization, other than Employers, which signs the Trust Agreement on behalf of its members or executes on behalf of such members a written acceptance of and agreement to be bound by the terms of the Trust Agreement.

Section 7. Fund:

Trust fund created and established by the Trust Agreement.

Section 8. Local Union:

Any local union affiliated with Union.

Section 9. Union:

The following union entities which are parties to this Trust Agreement: OREGON STATE COUNCIL OF CARPENTERS; PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS; SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS; PILE DRIVERS, BRIDGE, DOCK AND WHARF BUILDERS of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

Section 10. Trust Agreement:

This agreement and any modification, amendment, extension, supplementation or renewal thereof.

Section 11. Trustee:

Any natural person designated as a trustee pursuant to Article III hereof.

Section 12. Pensioner:

Any employee, as defined in Section 3 hereof, who has terminated said employment and is entitled to benefits from the Trust Fund under the Pension Plan.

Section 13. Plan:

The Pension Plan created pursuant to the Collective Bargaining Agreements and this Trust Agreement and any modification, amendment, extension, supplementation or renewal of said Plan.

In construing the terms and their definitions in this Article I, the singular shall include the plural and the plural the singular as circumstances may require.

ARTICLE II**Purpose and Application of the Fund**

Section 1. There is hereby created the Oregon-Washington Carpenters-Employers Trust Fund which shall consist of all contributions made for the establishment and maintenance of the Plan, investments made and held by the Trustees, and all interest, income and other returns thereon of any kind whatsoever, and any other property received or held by the Trustees pursuant to this Trust Agreement.

Section 2. This Trust Fund is created for the purpose of assisting Employees and their beneficiaries in providing a life income for their support when they shall have retired from the industry, as may be determined by the Board of Trustees pursuant to the provisions of the Pension Plan. The Board of Trustees shall establish in the Plan such eligibility requirements and benefit schedules as it may from time to time deem appropriate.

Section 3. The Fund shall have its principal office in the city of Portland, County of Multnomah, State of Oregon. The venue for all causes of action or proceedings involving the Trust Fund brought in the State of Oregon shall be laid

in Multnomah County, Oregon and the venue for those causes of action or proceedings brought in the State of Washington shall be laid in Clark County, Washington.

Section 4. No Employee, Pensioner or beneficiary under the Pension Plan shall be entitled to receive any part of the contributions made or required to be made to the Trust Fund in lieu of the benefits provided by the Pension Plan. All rights of any Employee, Pensioner or beneficiary under the Pension Plan shall be limited to the benefits provided by the Pension Plan as fixed and determined by the Board of Trustees.

Section 5. Neither the Employers, any Signatory Association, any Individual Employer, the Union, any Local Union, any Employee, Pensioner nor beneficiary under the Plan nor any other person shall have any right, title or interest in or to the Fund other than as specifically provided in this Trust Agreement or in the Plan. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities of any Employers, any Signatory Association, any Individual Employer, the Union, any Local Union, nor any Employee, Pensioner or beneficiary, under the Plan. No part of the Fund nor any benefits payable in accordance with the Pension Plan shall be subject in any manner to voluntary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants and from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings to the fullest extent permissible by law.

Section 6. Neither the Employers, Union, Local Union nor any Signatory Association, nor officer, agent, employee or committee member of the Employers, Union, Local Union or any Signatory Association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Plan, except to the extent that he or it may be an Individual Employer required to make payments to the Fund with respect to his or its own individual or joint venture operations or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or

with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement or Trust Agreement (including the payments as required by the Trustees as authorized by the Collective Bargaining Agreement) with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the contributions due from other Individual Employers. The Individual Employers shall not be required to make any further contributions to the cost of operation of the Fund or of the Plan, except as herein elsewhere provided. This section shall only apply to the extent permitted by law.

Section 7. To the extent permitted by law, neither the Employers, any Signatory Association, any Individual Employer, the Union, any Local [96] Union, nor any Employee, Pensioner or beneficiary under the Pension Plan shall be liable or responsible for any debts, liabilities or obligations of the Fund or of the Trustees.

Section 8. Contributions to the Fund shall be due commencing June 1, 1962 for work on and after that date and shall be payable at the principal office of the Fund in Portland, Oregon in regular monthly installments starting on or before July 25, 1962, and continuing from month to month thereafter subject to the provisions of the Collective Bargaining Agreement. The contribution payable on or before July 25, 1962 shall include all payments which have theretofore accrued for work performed during the period from June 1, 1962 up to the close of the Individual Employer's payroll period ending closest to the last day of that month, and thereafter each monthly contribution shall include all payments which have accrued in the interim for work performed up to the close of the Individual Employer's payroll period ending closest to the last day of the preceding calendar month. Each monthly contribution shall be accompanied by a report in a form prescribed by the Board of Trustees.

Section 9. Each contribution to the Fund shall be made promptly, and in any event made so as to be received at the principal office of the Fund on or before the 25th day of the calendar month in which it becomes payable, on which date

said contribution, if not then paid in full, shall be delinquent. If any Individual Employer fails to make his or its monthly contribution in full on or before the 25th day of the month on four occasions within any 12-month period, the Board of Trustees may provide by resolution that thereafter during the 12-month period immediately following such resolution the 10th day of the month shall be the delinquency date for such Individual Employer. The parties recognize and acknowledge that the regular and prompt payments of Individual Employer contributions to the Fund is essential to the maintenance in effect of the Plan, and that it would be extremely difficult and impracticable to fix the actual expense and damage to the Fund and to the Plan which would result from the failure of an Individual Employer to pay such monthly contributions in full within the time above provided. Therefore, the amount of damage to the Fund and the Plan resulting from any such failure shall be the sum of 10 per cent of the amount of the contribution or contributions due, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in Portland, Oregon, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions.

In addition to the foregoing, interest shall accrue at the rate of 1 per cent a month on all delinquent contributions from the due date of the contribution until paid.

In case of failure of an Individual Employer to make required contributions to this Trust Fund the Trustees may take necessary legal action to collect such withheld contributions as well as costs of such action and any damages to the Fund or Plan caused by such failure to make said contributions. Continued failure to make prompt payments to the Fund or failure to make required payments shall be deemed to be a breach of the Collective Bargaining Agreement by the Individual Employer, and, in such event, the parties to this Trust Agreement may jointly or severally bring action against the Individual Employer in law or in equity or may use other economic action to either compel the performance of this Trust Agreement as well as the

Collective Bargaining Agreement, or as well to require the Individual Employer to make any and all payments due or to become due by him under the terms of this Trust Agreement.

Section 10. The Fund shall be administered by the Board of Trustees for the exclusive benefit of Employees, Pensioners, and beneficiaries pursuant to the provisions of the Plan. Notwithstanding anything to the contrary contained in this Trust Agreement or in the Pension Plan any modification, amendment, extension or renewal hereof or of the Plan, no portion of the Fund shall at any time revert to, or be recoverable by any of the Employers, any Signatory Association, any Individual Employer, any Union or Local Union or be used for or diverted to purposes other than for the exclusive benefit of Employees, Pensioners, or beneficiaries under the Plan, and the payment of the administrative expenses of the Fund and the Plan or refund of erroneous payments.

ARTICLE III

Board of Trustees

Section 1. The Fund shall be administered by the Board of Trustees which shall consist of five Trustees representing employers and five Trustees representing employees. The Trustees representing employers shall be appointed by Employers in accordance with the following provisions: Three Employer Trustees shall be selected by and representing the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.; one Employer Trustee shall be selected by and representing the Portland Home Builders Association; and one employer Trustee shall be selected by and representing such other Employers as a group. Each Employer Trustee shall have his appointment confirmed by an instrument in writing by the respective Employer or group of Employers as provided above directed to each of the other parties hereto.

The Trustees representing employees shall be appointed by Union parties hereto, in accordance with the following provisions: One Employee Trustee shall be a member in good standing of, selected by and representing Oregon

State Council of Carpenters; one Employee trustee shall be a member in good standing of, selected by and representing the District Council of Carpenters of Portland and Vicinity; one Employee Trustee shall be a member in good standing of, selected by and representing Southwest Washington District Council of Carpenters; and one Employee Trustee shall be a member in good standing of one of the Local Unions of Pile Drivers, Bridge, Dock & Wharf Builders parties hereto selected by and representing such Local Unions as a group. The remaining Employee Trustee shall be a member in good standing of the Union, selected by and representing the Union at large on the Board of Trustees.

Each such Employee Trustee shall have his appointment confirmed by an instrument in writing by the respective Union entity directed to each of the other parties hereto. The Trustee selected to represent Union at large shall have his appointment confirmed by an instrument in writing by all of the Union entities directed to the other parties hereto.

The Employer and Employee Trustees so appointed shall sign this Trust Agreement, or a duplicate thereof, and such signatures shall constitute their acceptance of office and agreement to act under and be subject to all the terms and conditions of this Trust Agreement.

* * *

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ARTICLE IV

Functions and Powers of the Board of Trustees

Section 1. The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Plan in effect, having and performing all powers and duties reasonably necessary to maintain and operate the Plan in such a way as to accomplish its objectives. The detailed basis on which pension benefits are to be paid shall be as set forth in the Appendix attached hereto and designated as the Pension Plan of the Oregon-Washington Carpenters-Employers Pension Trust Fund. The Board of Trustees may at any time, and from time to time, amend or modify such Plan, except that no amendment or modification may reduce any benefits payable to the Pensioners or beneficia-

ries under the Pension Plan who retire prior to such amendment or modification so long as funds are available for payment of such benefits. In no event shall any amendment or modification of the Plan cause or result in any portion of the Fund reverting to, or being recoverable by, any of the Employers, any Signatory Association, any Individual Employer, the Union or any Local Union or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of Employees, Pensioners or beneficiaries under the Pension Plan and the payment of the administrative expenses of the Fund and the Plan, or the refund of erroneous payments.

Section 2. The Board of Trustees shall have the power to construe the provisions of this Trust Agreement and the Plan and any such construction adopted by it in good faith shall be binding upon any and all parties and persons affected thereby.

Section 3. The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Plan in effect.

Section 4. The Board of Trustees shall collect and receive all contributions to the Fund, and it shall promptly deposit such contributions in a special Trust Fund account or accounts established in a reputable bank or banks located in the city and county of the principal office of the Fund, or in any other city or county within the area covered by the Collective Bargaining Agreement in effect between the parties hereto.

Section 5. The Trustees shall have the power to demand and enforce prompt payment to the Fund, including contributions due to delinquencies as provided in Section 9 and 10 of Article II, and to assert and enforce all priorities, lien rights, and other claims or rights with respect to any contributions belonging to the Fund, this trust or any of its beneficiaries, including the rights to file priority and other claims in bankruptcy. If any Individual Employer defaults in the making of such contributions and if the Board consults or causes to be consulted legal counsel with respect thereto, or files or causes to be filed any suit or claim with respect thereto, there shall be added to the obligation

of the Individual Employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred in connection with such suit or claim, including any and all appellate proceedings therein.

* * *

[100]

ARTICLE VIII General Provisions

* * *

Section 10. In the establishment and maintenance of the Plan, and in the execution, amendment and implementation of this Trust Agreement, Employers act for and on behalf of the Individual Employers except Union and Local Unions who, at the time of the execution of this Trust Agreement are, or during the term thereof become members of any of the Employers, or of any signatory Association for and on behalf of any other Individual Employer except Union and Local Unions who is required by the Collective Bargaining Agreement to make contributions to the Fund or who in fact makes one or more contributions to the Fund. Every agreement or act of the Employers in connection with the establishment, maintenance and operation of the Fund or the Plan shall be deemed to be and is the agreement or act of the Individual Employers, or Individual Employer, except Union or Local Unions concerned or affected by such agreement or action.

* * *

[101]

ARTICLE IX Non-Member Employers

Section 1. The parties acknowledge that in order for the Plan to operate successfully and equitably all Individual Employers performing work within the coverage and jurisdiction of the Collective Bargaining Agreement should make contributions to the Fund equivalent to those required by the Collective Bargaining Agreement, whether or not they are members of, or represented by, Employers or any Signatory Association.

Section 2. Any Individual Employer who executes a Collective Bargaining Agreement, assumes and shall be bound by all the obligations imposed by this Trust Agreement

upon the Individual Employer, is entitled to all rights under this Trust Agreement and is otherwise subject to it in all respects.

ARTICLE X

Amendment and Termination

Section 1. The provisions of this Trust Agreement may be amended or modified at any time, or from time to time, by mutual agreement of Employers and Union, subject to the terms and conditions of the Collective Bargaining Agreement any applicable law or regulation. Signatory Associations, Individual Employers, Local Unions, Employees, Pensioners, and beneficiaries under the Plan shall be bound by such amendments and/or modifications.

Section 2. The provisions of this Trust Agreement shall continue in effect during the term of the Collective Bargaining Agreement and any amendments, modifications, renewals, extensions thereof with respect to such Collective Bargaining Agreement as provide for the continuation of contributions into the Fund and of the Plan.

Section 3. This Trust Agreement and the Trust herein provided may be terminated by Employers and Union by an instrument in writing executed by mutual consent at any time subject to the provisions of Section 6 of this article.

Section 4. In no event shall the Trust established by this Trust Agreement continue for a longer period than is permitted by law.

Section 5. Upon the termination of the Trust, any monies remaining in the Fund after the payment of all expenses and obligations of the Trust shall be paid or used for the continuance of one or more pension benefits in accordance with the provisions of the Pension Plan until the Fund is exhausted.

Section 6. In no event shall any amendment or modification of this Trust Agreement, or the termination of this Trust Agreement or the Trust, cause or result in any portion of the Fund reverting to, or being recoverable by, any of the Employers, any Signatory Association, any Individual Employer, Union or any Local Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of Employees,

Pensioners and beneficiaries under the Plan and the payment of the administrative expenses of the Fund and the Plan.

IN THE WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

FOR THE UNION:

OREGON STATE COUNCIL OF CARPENTERS,
PORTLAND & VICINITY DISTRICT COUNCIL OF CARPENTERS, SOUTHWEST WASHINGTON DISTRICT COUNCIL OF CARPENTERS and the PILEDRIVERS, BRIDGE, DOCK & WHARF BUILDERS & DIVERS.

Roy W. Coles

Donald C. Staudenmier

Harold G. Hansen

A. J. Darling

FOR THE EMPLOYER:

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

George H. Lord

Richard Geary

Kenneth W. Twedt, Manager

EUGENE CONTRACTORS ASSOCIATION

Avon Lee Babb

ASSOCIATED INTERIOR CONTRACTORS OF OREGON AND SOUTHWEST WASHINGTON, INC.

David O. Johnson, President

SOUTHWEST WASHINGTON CONTRACTORS ASSOCIATION, INC.

James R. Watts, Attorney

PORTLAND & VICINITY

DISTRICT COUNCIL OF CARPENTERS

Donald C. Staudenmier, Executive Secretary-Treasurer

OREGON STATE COUNCIL OF CARPENTERS

Roy W. Coles, Executive Secretary-Treasurer

HOME BUILDERS OF

METROPOLITAN PORTLAND

Rychen Paddock, Director

[103] [Exhibit Three to PBGC Memorandum of Points
and Authorities]

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND

MULTIEMPLOYER PENSION PLAN AMENDMENTS
ACT OF 1980

Compliance Policy

July 28, 1981

[104] OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND
MULTIEMPLOYER PENSION PLAN AMENDMENTS
ACT OF 1980

COMPLIANCE POLICY

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I

Multiemployer Plan Status

The Oregon-Washington Carpenters-Employers Pension Trust Fund and the related Revised Pension Plan constitute a multiemployer plan as it is a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Sections 3(37)(A) and 4001(a)(3) and Internal Revenue Code of 1954, as amended ("Code"), Section 414(f).

II

Building and Construction Industry Plan Status

The Carpenters Pension Plan primarily covers employees in the building and construction industry. The Plan is maintained primarily pursuant to the Carpenters Master Labor Agreement which governs:

"* * * all types of construction work coming within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America as recognized by the AFL-CIO Building and Construction Trades Department." Carpenters Master Labor Agreement Article II, Section 1.

III

Controlled Group of Employers

For purposes of determining whether an employer has withdrawn and the attendant withdrawal liability, all trades or businesses under common control (a "controlled group") are treated as a single employer. ERISA Section 4001(c)(1).

[108] A controlled group exists in the following situations:

(a) *Parent-Subsidiary Group.* A "parent-subsidiary" controlled group of trades or businesses exists if one or more chains of organizations is connected through ownership of a *controlling interest*. A controlling interest is ownership of 80 percent of the stock voting power or 80 percent of the value of all stock of a corporation, an actuarial interest of at least 80 percent of a trust or estate, 80 percent of

the profits or capital interest of a partnership or 100 percent of a sole proprietorship.

(b) *Brother-Sister Group*. A "brother-sister" controlled group of trades or businesses exists if the same five or fewer persons own a controlling interest in two or more organizations and there is *effective control* of each organization to the extent of identical ownership. Effective control is the same as a "controlling interest" for a parent-subsidiary group except that the applicable percentage is 50 percent rather than 80 percent.

(c) *Combined Group*. A "combined group" of trades or businesses exists if with respect to any group of three or more organizations each organization is a member of a parent-subsidiary or brother-sister group and at least one of the organizations is the common parent of a parent-subsidiary group and is also a member of a brother-sister group.

Code Section 414(c) and IRS Reg. § 11.414(c)-1 and 2.

[109]

IV

Withdrawal

(a) *Building and Construction*. If substantially all the employees, with respect to whom an employer has an obligation to contribute, perform work in the building and construction industry, a *complete* withdrawal occurs if:

"(A) an employer ceases to have an obligation to contribute under the plan, and

"(B) the employer—

"(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

"(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." ERISA Section 4203(b)(2).

A *partial* withdrawal occurs for such a building and construction industry employer only if:

"* * * the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of

the collective bargaining agreement of the type for which contributions are required." ERISA Section 4208(d).

(b) *Nonbuilding and Construction*. If substantially all the employees with respect to whom an employer has an obligation to contribute *do not* perform work in the building and construction industry, a *complete* withdrawal occurs if an employer:

"(1) permanently ceases to have an obligation to contribute under the plan, or

"(2) permanently ceases all covered operations under the plan." ERISA Section 4203(a).

[110] A *partial* withdrawal occurs for such a nonbuilding and construction industry employer only if:

"(1) there is a 70-percent contribution decline (effective July 1, 1982), or

"(2) there is a partial cessation of the employer's contribution obligation." ERISA Section 4205(a).

A 70-percent contribution decline and a partial cessation of the employer's contribution obligation are defined at ERISA Section 4205(b)(1) and (2).

(c) *Date of Withdrawal*.

"[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." ERISA Section 4203(e).

A partial withdrawal occurs on the last day of the plan year in which the last event causing the partial withdrawal occurred. ERISA Section 4205(a).

(d) *Sale of Assets*. A complete or partial withdrawal does not occur solely because of a sale of employer assets that complies with ERISA Section 4204.

That asset sale rule does not typically apply to a noncontrolled group building and construction employer as after the asset sale the employer does not continue craft work on a nonbargained basis within the five-year period. That asset sale rule may apply to a nonbuilding and construction employer, and a controlled group building and construction employer who sells the assets of a bargained controlled group member and continues craft work on a

nonbargained basis through the nonbargained controlled group member.

[111] Immediate, complete or partial withdrawal liability can be avoided upon a bona fide, arm's length sale of assets to an unrelated purchaser if:

(1) The purchaser contributes for substantially the same number of covered hours as the seller.

(2) The purchaser provides the Trust Fund with a qualifying five-year bond or escrow in the amount provided in ERISA Section 4204(a)(1)(B) which is payable if the purchaser withdraws or fails to make a contribution when due during the five-year period.

(3) The sale contract provides for seller secondary liability if the purchaser has a withdrawal during the five-year period.

The seller must provide a qualifying bond or escrow if substantially all its assets are distributed or it is liquidated before the end of the five-year period.

V

Withdrawal Liability Allocation Formula

(a) *Presumptive Method.* As the Carpenters Pension Trust Fund primarily covers employers in the building and construction industry, the ERISA Section 4211(a) presumptive method is the method by which employer withdrawal liability is allocated. The ERISA Section 4211(c) optional methods are limited to nonbuilding and construction industry plans.

An employer's withdrawal liability on complete withdrawal is the sum of (1), (2) and (3), minus (4) as follows:

[112] (1) *Pre-Act Unfunded Vested Benefits.*

Unamortized 6-30-79
Unfunded Vested
Benefits

Withdrawing Employer Contributions Required	
× 7-1-74 thru 6-30-79	
<hr/>	= \$ ____
Total Employer Contributions made 7-1-74 thru 6-30-79	

(2) *Annual Unfunded Vested Benefits Change.*

Unamortized Annual Unfunded Vested Bene- fit Change	×	Withdrawing Employer Contributions In Year of Change and Four Prior Years	=	\$_____
		Total Employer Contri- butions Made In Year of Change and Four Prior Years		

A separate formula must be used for each plan year after June 30, 1979. The annual unfunded vested benefit change is the amount by which:

(A) The plan year-end unfunded vested benefits;
exceeds:

(B) The sum of:

(i) The unamortized June 30, 1979, unfunded vested benefits, and

(ii) The sum of the unamortized amounts of the change in unfunded vested benefits for each plan year after June 30, 1979, and before the plan year for which the change is determined.

[113] (3) *Reallocated Unfunded Vested Benefits.*

Unamortized, Reallocated Unfunded Vested Benefits End of Plan Year Prior To Withdrawal	×	Withdrawing Employer Contributions In Year of Change and Four Prior Years	=	\$_____
		Total Employer Contri- butions Made In Year of Change and Four Prior Years		

Reallocated unfunded vested benefits are the sum of the:

(A) Amount the Board of Trustees determines uncollectible for reasons arising out of bankruptcy or similar proceedings,

(B) Amount the Board of Trustees determines will not be assessed because it is de minimis, it exceeds the 20-year payment cap or it arises from an asset sale for which withdrawal liability cannot be collected under ERISA Section 4225, and the

(C) Amount the Board of Trustees determines uncollectible or unassessable for other reasons under

Pension Benefit Guaranty Corporation ("PBGC") regulation standards.

(4) *De Minimis Withdrawal Liability*. The foregoing employer withdrawal liability shall be reduced by:

(A) The smaller of:

(i) "¼ of 1 percent of the plan's unfunded vested obligations (determined as of the end of the plan year ending before the date of withdrawal), or"

(ii) "\$50,000," minus

[114] (B) " * * * the amount, if any, by which the * * * [employer's withdrawal liability] exceeds \$100,000." ERISA Section 4209(a).

An employer's withdrawal liability on partial withdrawal is a pro rata portion of his complete withdrawal liability based on covered hours as provided at ERISA Section 4206.

(b) *Elements of Withdrawal Liability Formula*.

(1) *Unfunded Vested Benefits*. Unfunded vested benefits are the value of nonforfeitable Plan benefits, less the value of Trust assets. ERISA Section 4213(c). As determined by the Plan actuary, the value of nonforfeitable Plan benefits is based on the actuarial assumptions and methods of the Trust Fund's most recent actuarial valuation, except that, to the extent the value of Trust assets covers total vested benefits, the withdrawal liability for those benefits are valued at varying interest rates determined by the Plan actuary depending on the period left until retirement. ERISA Section 4213(a) and (b).

Unamortized vested benefits are the foregoing unfunded vested benefit amounts, amortized at 5 percent a year. ERISA Sections 4211(b)(2)(C), (D) and 4211(b)(4)(C).

(2) *Contributions*.

(A) *Five-Year Period*. The numerator and denominator of the foregoing withdrawal liability fractions are determined using a five plan year period rather than an up to [115] ten-plan year period as permitted by ERISA Section 4211(c)(5)(C). A more lengthy period would not more equitably allocate withdrawal li-

ability and increases Trust Fund administrative costs.

(B) *Modified Accrual*. The contribution amount of the numerator and denominator of the foregoing withdrawal liability fractions is determined on a modified accrual basis. Contributions received in July for June hours and delinquent contributions for the prior plan year made in July and August are deemed made for the prior plan year.

(C) *Denominator Exclusion*. Because of the large number of small employers who contribute to the Trust Fund and their high turnover rate, only the contributions of "significant withdrawn employers" are excluded from the denominator of the withdrawal liability fractions. ERISA Section 4211(c)(5)(D) and 29 CFR § 2652.6(c) and Carpenters Revised Pension Plan Amendment No. 6, Section 12.02. Exclusion of the contributions of all withdrawn employers would result in substantial administrative expense for which there is no clear benefit to participants and beneficiaries.

[116] A "significant withdrawn employer" is an employer to whom the Trust Fund has sent a notice of withdrawal liability or an employer who in any plan year used to determine the withdrawal liability fraction contributed the lesser of \$250,000 or 1 percent of all employer contributions.

A building and construction employer will be deemed to have withdrawn from the Plan prior to April 29, 1980, effective date of the Multiemployer Pension Amendments Act of 1980 ("Multiemployer Act") withdrawal liability provisions if the employer ceased contributing to the Trust Fund for a period greater than a typical cyclical shutdown as determined by the Committee, which continued through April 29, 1980, irrespective of whether there was a cessation of the labor agreement obligation to contribute.

VI

Monitoring Withdrawals

(a) *Potential Withdrawals.* The Fund Manager shall monitor potential withdrawals. The following occurrences indicate that an employer may have withdrawn:

(1) *Termination of Labor Agreement.* Labor agreements are terminated by advance written notice to the union pursuant to the terms of the labor agreement. The [117] Fund Manager shall arrange with the affected union to advise the Fund Manager when a termination notice is received and the effective date thereof.

Between the date the Fund Manager is notified by the filing of the termination notice and the effective date of the cessation of the labor agreement obligation to contribute, the Fund Manager shall monitor the monthly employer contribution reports to determine whether a partial withdrawal occurs in that interim period. A partial withdrawal may occur if the employer is substantially shifting his craft work to a nonunion controlled group member in anticipation of the termination of the labor agreement. If there has been a 70 percent decline in the reported contributed hours during any reasonable period, the Fund Manager shall send the employer the attached Exhibit A information request.

As soon as possible after the effective date of the termination of a labor agreement, the Fund Manager shall send the employer the attached Exhibit A information request, unless it is known that the employer has not continued craft work in the Trust Fund area without a labor agreement. The Fund Manager shall request the affected employer, association and union to advise whether such craft work has continued. If the employer has not had a withdrawal, the Fund Manager shall make a similar inquiry no later than the second, fourth and fifth anniversaries of the termination of the labor [118] agreement and at such earlier times as evidence comes to the Fund Manager's attention that craft work is being done without a labor agreement, unless it is

known that the employer has not continued craft work in the Trust Fund area without a labor agreement.

(2) *Complete Cessation of Contributions.* If an employer ceases to report any covered hours, ceases to file monthly employer reports or notifies the Fund Manager that it is filing its last employer report, the Fund Manager shall send the employer the attached Exhibit A information request, upon such cessation of contributions and a similar inquiry no later than the second, fourth and fifth anniversaries thereof in order to determine whether a partial withdrawal has occurred. Exhibit A need not be sent if the Fund Manager can reasonably confirm from an employer association or an affected union that the employer and his controlled group are not doing craft work on a nonbargained basis.

(3) *Substantial Decline In Contributions.* In order to determine if a partial withdrawal has occurred, the Fund Manager shall monitor whether any employer has a decline of 70 percent or more in reported covered hours during all or any portion of the prior two-year period. Initial monitoring can be done by comparing an employer's reported covered hours for the most recent plan year with covered hours for the prior plan year. If other facts [119] indicate a substantial decline has occurred, the employer's reported covered hours should be reviewed for such longer or shorter period as necessary.

If a 70 percent decline has occurred or other facts exist which indicate a partial withdrawal may have occurred, the Fund Manager shall send the employer the attached Exhibit A information request, unless it can be reasonably confirmed by an employer association or affected union that the employer and his controlled group are not doing craft work on a nonbargained basis.

(b) *Withdrawal Liability Committee.*

(1) *Failure To Respond To Information Request.* If an employer fails to respond to the attached Exhibit A information request or responds incompletely such that it is not possible to determine if a withdrawal has occurred, it shall be referred to the committee desig-

nated by the Board of Trustees to handle withdrawal liability matters ("Committee"). The Committee shall determine whether to direct legal counsel to seek a court order to obtain that information, to conduct a termination/withdrawal liability audit or both.

(2) *Withdrawal Determination.* The Committee shall determine whether a complete or partial withdrawal has occurred based on the information provided by the Fund Manager.

[120]

VII

Calculation of Withdrawal Liability

(a) *Fund Manager Calculation.*

(1) *Total Withdrawal Liability.* When the Committee determines that a withdrawal has occurred, the Fund Manager shall calculate the nonde [sic] minimis withdrawal liability pursuant to the formulas described in V(a) above. After obtaining the necessary information from the Fund Manager, the consultant shall annually provide the Fund Manager with those formulas, with completed dollar amounts.

(2) *Amortization Schedule.* The Fund Manager shall also prepare the amortization schedule for the employer's withdrawal liability in the form attached as Exhibit B.

The period of years necessary to amortize the withdrawal liability in level annual payments, as if the first payment is made on the first day of the plan year following withdrawal, shall be based on the assumptions used in the most recent Plan actuarial valuation. ERISA Section 4219(c)(1)(A).

The amount of the annual payment shall be determined as follows:

Average Contribution	Highest	Annual
Base Units	× Contribution Rate	= Payment

"Contribution base units" are work hours for which an employer must contribute to the Trust Fund, ERISA [121] Section 4001(a)(11). "Average contribution base units" are the average covered hours on which the employer was obligated to contribute to the Trust Fund for the three consecutive plan-year periods during the five consecutive plan years ending before withdrawal in which the required cov-

ered hours were the highest. ERISA Section 4219(c)(1)(C)(I) [sic]. The "highest contribution rate" is the employer's highest contribution rate during the five plan years ending with the plan year of withdrawal. The five-year period used in determining the "average contribution base units" and the "highest contribution rate" shall be increased by one for each plan year after June 30, 1980, up to a total of ten beginning with the July 1, 1984, through June 30, 1985, plan year and thereafter. ERISA Section 4219(c)(1)(C)(iii) and Carpenters Revised Pension Plan Article 12, Section 12.04.

The amortization schedule will provide for equal quarterly installments paid in advance. ERISA Section 4219(c)(3). The due date for the first installment shall be fixed so that it is about 60 days after the date of demand. ERISA Section 4219(c)(2).

(b) *Consultant Review*. After calculating an employer's withdrawal liability, the Fund Manager shall forward the withdrawal liability calculations and the amortization schedule to the consultant for review and confirmation.

[122]

VIII

Reallocation of Withdrawal Liability

If any withdrawal liability is not assessable because it is de minimis, it exceeds the 20-year payment cap or there is a qualifying asset sale (ERISA Section 4225), or is uncollectible for reasons arising out of bankruptcy or similar proceedings or is uncollectible or unassessable for other reasons as determined by the Committee under standards not inconsistent with PBGC regulations, it shall be reallocated to the plan year in which that determination is made. The Fund Manager shall refer any uncollectible or unassessable withdrawal liability to the Committee for such reallocation as it becomes known to the Fund Manager.

IX

*Assessment and Collection of
Withdrawal Liability*

(a) *Notice and Demand.* Upon confirmation of the withdrawal liability and the amortization schedule by the actuary, the Fund Manager shall send the withdrawn employer attached Exhibit C, which notifies the employer of the amount of withdrawal liability and demands payment thereof, and shall enclose therewith the Exhibit B, schedule of payments. ERISA Section 4219(b)(1).

(b) *Employer Review Request.* If the employer asks for a review of any matter relating to determination of his liability and the schedule of payments, identifies any inaccuracy in that amount or furnishes additional relevant information (ERISA Section 4219(b)(2)(A)), the Fund Manager shall refer the matter [123] to the Committee. An employer request does not affect the employer's duty to make withdrawal liability payments when due. ERISA Section 4219(c)(2). After a reasonable review, the Committee shall notify the employer through the Fund Manager of its decision, the basis for the decision and the reason for any change in the withdrawal liability amount or the schedule of payments. ERISA Section 4219(b)(2)(B).

(c) *Late Payment and Default.* If a withdrawal liability payment is not paid by the due date, the Fund Manager shall immediately send the employer the notice attached as Exhibit D. If the past-due payment with accrued interest is not paid within 60 days after the employer receives the notice, the employer shall be in default. ERISA Section 4219(c)(5)(A). A default also occurs upon the occurrence of any other event which indicates a substantial likelihood of inability to pay such as the filing of a voluntary petition in bankruptcy, an adjudication in bankruptcy or entering into a composition of creditors. ERISA Section 4219(c)(5)(B).

Immediately upon a default, the Fund Manager shall notify the employer that the total outstanding withdrawal liability, plus accrued interest on that total from the date the initial payment was not paid when due, is immediately due and payable. ERISA Section 4219(c)(5). The Fund Manager

shall also refer the matter to co-legal counsel for collection pursuant to ERISA Section 4301.

Interest on past-due payments and on the total remaining withdrawal liability in the event of default shall be charged at [124] rates based on prevailing market rates for comparable obligations in accordance with PBGC regulations, if any. ERISA Section 4219(c)(6).

X

Employer Information Request

(a) *General Information.* Upon written employer request, the Fund manager shall provide the employer, without charge, with general information necessary for the employer to compute its withdrawal liability. General information includes unamortized unfunded vested benefits, contributions made by all employers and the de minimis amount of any withdrawal liability fractions.

(b) *Estimate of Liability and Unique Information.* Upon written employer request, the Fund Manager shall provide the employer, after receipt of the reasonable cost, with an estimate of the employer's potential withdrawal liability or provide information unique to that employer. Unique information includes the contribution required of a particular employer.

XI

Amendment and Scope of Policy

This Compliance Policy can be amended from time to time by resolution of the Board of Trustees or any committee thereof to which amendment authority is delegated. This Policy shall be updated periodically as regulations are issued under and interpretations are made of the Multiemployer Act. This Policy is [125] designed for the administrative convenience of the Trust Fund and shall not be interpreted to provide greater or lesser legal requirements than provided by the Multiemployer Act and the regulations and interpretations thereunder.

[137] [Exhibit Four to PBGC Memorandum of Points
and Authorities]

**OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND**

R. A. GRAY & CO.) BOARD OF TRUSTEES
WITHDRAWAL LIABILITY) ERISA SECTION 4219(b)(2)(A)
DETERMINATION) REVIEW
	DECISION ON REVIEW

Attached is the Abstract of Record relating to the computation of withdrawal liability of R. A. Gray & Co. ("Gray").

In his October 12, 1981, letter to the Fund Manager (Ab. Doc. No. 23), Gray's legal counsel requested the Board of Trustees to review eight items in connection with the assessment of withdrawal liability against Gray. The decision of the Board of Trustees on those items pursuant to Section 4219(b)(2)(B) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is set forth below in the order presented by Gray.

Labor Dispute. "Whether there was and remains a labor dispute." (Ab. Doc. No. 23 at A-243.)

The Board of Trustees holds that Gray did not withdraw from the Carpenters Pension Plan solely because of a suspension of contributions during a "labor dispute."

ERISA Section 4218 provides that:

"* * * an employer shall not be considered to have withdrawn from a plan solely because-

* * *

"(2) an employer suspends contributions under the plan during a labor dispute involving its employees."

[138] A "labor dispute" is not defined in the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act") which added that ERISA Section.

The labor dispute question was first brought to the Board of Trustees' attention by the August 6, 1981, letter of Gray's counsel (Ab. Doc. No. 19) and was described further in his November 2, 1981, letter (Ab. Doc. No. 26). Gray alleged that the Oregon State Council of Carpenters and its constit-

uent locals ("Union") struck Gray commencing June 1, 1980, and have picketed intermittently since (Ab. Doc. No. 19 at A-120). Gray's counsel stated that Gray has been advised that the picketing is at least in part for recognitional purposes and that Mr. Kirkland has stated the desire of his organization to have a collective bargaining agreement. Gray filed unfair labor practice charges with respect to this conduct (Ab. Doc. No. 26 at A-268).

Gray terminated its labor agreement June 1, 1980, by February 14, 1980, letter notice to the Oregon State Council of Carpenters (Ab. Doc. No. 1 at A-4, Ab. Doc. No. 2, and Ab. Doc. No. 28 at A-277). Picketing of Gray did not begin until June 2, 1980 (Ab. Doc. No. 28 at A-277). In advance of the contract termination date, Gray distributed "financial core" letters to its employees indicating a desire to go non-union. Gray has made no contributions to the Pension Trust Fund since July, 1980. In response to a Board of Trustees' inquiry, Gray [139] notified the Board of Trustees in September, 1980, that Gray was making its final report, that it had not employed carpenters in July, 1980, and did not again anticipate employing carpenters in the future (Ab. Doc. No. 9). Gray must have meant that it was not employing Union carpenters beginning July, 1980, as Gray has admitted its continued employment of carpenters (Ab. Doc. No. 13 at A-67). Gray has not notified the Board of Trustees that it was "suspending contributions because of a labor dispute" and has not recommenced contributions to this date.

After the contract termination date, some of Gray's employees attempted to withdraw from the Union requesting "financial core" status. Some 63 percent continued Gray employment in nonbargained status and the majority of the some 37 percent who ceased Gray employment were employed by other bargained employers (Ab. Doc. No. 28 at A-277). As indicated in Gray's final Trust Fund report received September 22, 1980 (Ab. Doc. No. 9), the Carpenters Union had no members employed by Gray beginning at the latest July, 1980, and Gray did not anticipate employing any more Union carpenters. Gray indicated by June 12, 1981, letter to the Oregon State Council of Carpenters that Gray had not heard from the Council for a substantial period of

time and assumed the State Council no longer claimed to represent a majority of Gray employees. (Ab. Doc. No. 24 at A-247).

[140] There have been no negotiations between Gray and the Carpenters Unions since early June, 1980, if then, shortly after termination of the collective bargaining agreement when the Union advised Gray's legal counsel that the Union would not consider subcontractor and union security clauses (Ab. Doc. No. 24 at A-237). It does not appear that there were even negotiations in June, 1980, as the Union took a Master Labor Agreement or nothing approach (Ab. Doc. No. 4). Picketing of Gray began June 2, 1980, and appears to have been for informational purposes rather than with respect to any ongoing labor dispute or for organizational purposes (Ab. Doc. No. 28 at A-277). Picket signs indicated that Gray did not have a contract with the Union (Ab. Doc. No. 28 at A-277).

Even if there was an ongoing labor dispute after May 31, 1980, it was not the reason for Gray's cessation of contributions which resulted from Gray's termination of its collective bargaining agreement pursuant to the required February 14, 1980, advance notice. Gray's creation of a new money purchase pension plan effective March 1, 1980, and the apparent extension of coverage under that plan and Gray's pre-existing profit sharing plan effective June 1, 1980 (Ab. Doc. No. 28 at A-277), implies that Gray never intended to resume Trust Fund contributions.

Constitutionality of Gray Withdrawal Liability Assessment. "Whether it would be constitutionally permissible [141] to assess withdrawal liability against R. A. Gray" (Ab. Doc. No. 23 at A-243).

The Board of Trustees holds that the constitutionality of the assessment of withdrawal liability against Gray is not a matter properly within the Board of Trustees' scope of review under ERISA Section 4219(b)(2). The review procedure included in that section was adopted as a part of the Multiemployer Act. It would be inconsistent with that review procedure which presumes the constitutionality of the Multiemployer Act for the Board of Trustees to make a decision on constitutionality. Furthermore, constitutionality is

not a matter specifically within ERISA Section 4219(b)(2)(A) for review by the Board of Trustees.

Election of Withdrawal Liability Formula. "Whether the trustees satisfied their fiduciary responsibilities in electing the withdrawal liability formula chosen." (Ab. Doc. No. 23 at A-243).

The Board of Trustees holds that it satisfied its fiduciary responsibilities in electing the ERISA Section 4211(b) method of allocating withdrawal liability although for the reasons discussed above in connection with constitutionality, the Board's satisfaction of its fiduciary responsibilities is not properly at [sic] matter reviewable by the Board pursuant to ERISA Section 4219(b)(2)(B).

ERISA Section 4211 provides a contributions-related presumptive method for allocating unfunded vested benefits, two [142] optional contributions-related methods and an optional method which provides for allocation of unfunded vested benefits based on vested benefits attributable to the withdrawn employer and the employer's share of unattributable vested benefits. ERISA Section 4211(c)(5) provides that a plan may adopt any other alternative method for allocating unfunded vested benefits subject to Pension Benefit Guaranty Corporation ("PBGC") approval and pursuant to PBGC regulation.

ERISA Section 4211(c)(1) provides that none of the optional methods is available to a plan which primarily covers employees in the building and construction industry except to the extent provided in PBGC regulations. No such regulations have been issued and by virtue of ERISA Section 4214(a) no alternative formula could retroactively apply to Gray without its consent.

The phrase "building and construction industry" is not defined in the Multiemployer Act. The PBGC indicated in its proposed agenda of priority regulations that it would define "building and construction industry" but the regulations have not yet been issued.

The Carpenters Master Labor Agreement at Article II, Section 1, governs

"* * * all types of construction work coming within the jurisdiction of the United Brotherhood of Carpen-

ters and Joiners of America as recognized by the AFL-CIO Building and Construction Trades Department." (Ab. Doc No. 1 at A-2).

[143] Based on the types of work covered by the Master Labor Agreement, the Carpenters Pension Plan primarily covers employees in the building and construction industry. (Ab. Doc. No. 18 at A-90.)

As the optional methods were not available, the Board of Trustees selected the statutory presumptive method of allocating unfunded vested benefits (Ab. Doc. No. 11 at A-58). Adoption of this presumptive method was based on the October 17, 1980, opinion of co-legal counsel and the December 22, 1980, report of the Trust Fund consultant.

Schedule of Payments. "Whether the schedule of payments is appropriate." (At [sic] Doc. No. 23 at A-243.)

The Board of Trustees holds that the Gray schedule of payments is appropriate.

Gray has neither identified any inaccuracy in the schedule of payments nor provided any additional information relevant thereto.

The payment schedule is set forth in the July 24, 1981, Fund Manager demand letter (Ab. Doc. No. 17). The first payment was due within 60 days of that letter and further payments on subsequent January 1, April 1, July 1 and October 1 dates with the final of the 13 payments due October 1, 1984.

ERISA Section 4219(c)(1)(A)(i) provides that the employer is to pay its withdrawal liability over the period necessary to amortize that amount in level annual payments [144] calculated as if the first payment was made on the first of the plan year following withdrawal and subsequent payments on the first day of each subsequent year. The amortization period is to be based on the plan's most recent actuarial valuation. ERISA Section 4219(c)(1)(A)(ii).

ERISA Section 4219(c)(1)(C) provides that the amount of each annual payment is the product of the employer's average covered hours in the three plan years during the ten years preceding withdrawal in which the average covered hours were the highest. The Board of Trustees chose the op-

tional period of five increasing to ten years permitted by ERISA Section 4219(c)(1)(C)(iii) (Ab. Doc. No. 11 at A-59).

ERISA Section 4219(c)(2) provides that the first withdrawal liability payment is to be made no later than 60 days after the date of demand. Each annual payment is payable in four installments due quarterly. ERISA Section 4219(c)(3). The Board of Trustees did not adopt an alternative payment interval (Ab. Doc. No. 18 at A-104).

Annual payments and the schedule were prepared by the Trust Fund consultant and set forth at Exhibit I to the demand letter (Ab. Doc. No. 17 at A-83).

The consultant's worksheet for determining the length of the payment period is based on the Plan's assumed rate of interest, 5 percent, in effect on the withdrawal date (Ab. Doc. No. 16 at A-82 and Ab. Doc. No. 15 at A-78).

[145] The November 2, 1981, letter from Gray's counsel (Ab. Doc. No. 26 at A-269) indicates that it is not clear how each of the entries in the calculation of Gray's withdrawal liability was determined. This question, though not directly raised in Gray's request for review (Ab. Doc. No. 23), most closely relates to the schedule of withdrawal liability payments which results from the calculation of Gray's withdrawal liability.

The withdrawal liability formula applicable to Gray is as follows:

	<div>Withdrawing Employer Contributions Required 7-1-74 thru 6-30-79</div> <hr/>
Unfunded Vested Benefits 6-30-79	<div>× All Employer Contributions Made Made 7-1-74 thru 6-30-79 Excluding Significant Withdrawn Employers</div>

Unfunded vested benefits are discussed in connection with the following item raised by Gray.

Both Gray's contributions in the numerator and all employer contributions in the denominator were determined using the modified accrual method used on an ongoing basis by the Trust Fund (Ab. Doc. No. 11 at A-59). Under that method all contributions received in July and any delinquent contributions received in August are credited to the prior

July 1 through June 30 plan year. All other contributions are credited to the year in which received.

ERISA Section 4211(b)(3)(B)(ii) provides that the denominator:

[146] " * * * is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers—

"(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

"(II) who had not withdrawn from the plan before such date."

ERISA Section (c)(5)(D) [sic] [should be "Section 4211(c)(5)(D)"] provides that

"The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators."

By 29 CFR § 2652.6(c) the PBGC authorized a plan by amendment to exclude from the denominator only the contributions of "significant withdrawn employers". The Board of Trustees adopted the significant withdrawn employer option (Ab. Doc. No. 11 at A-58 and A-59). That rule has the effect of decreasing Gray's potential withdrawal liability, because the fewer employers excluded, the higher the denominator, and the lower Gray's share of unfunded vested benefits. Fund Manager worksheets regarding the calculation of significant withdrawn employer contributions are set forth at Ab. Doc. No. 10. The contribution amounts excluded from the denominator are set forth in Ab. Doc. No. 14 at A-70.

Accuracy of Actuarially Determined Unfunded Vested Benefits. "Whether the actuarially determined unfunded vested benefits are accurate." (Ab. Doc. No. 23.)

[147] The Board of Trustees holds that, based on the information provided, the Plan actuarially determined unfunded vested benefits are accurate.

Gray has not identified any inaccuracy in the determination of unfunded vested benefits nor provided any additional relevant information.

Unfunded vested benefits are the value of nonforfeitable plan benefits less the value of trust assets (ERISA Section 4213(c)). Withdrawal liability is to be determined on the basis of actuarial assumptions and methods which in the aggregate are reasonable and which in combination offer the actuary's best estimate of anticipated experience under the plan or actuarial assumptions and methods set forth in the PBGC's regulations (ERISA Section 4213(a)). To date the PBGC has not issued a regulation on actuarial assumptions.

In determining unfunded vested benefits, the actuary may rely on the most recent complete actuarial valuation of the plan (ERISA Section 4213(b)(1)). The actuary has relied on that valuation, including valuation assumptions, except to the extent the value of Trust assets covers total vested benefits. To that extent Plan benefits are valued at varying interest rates determined by the plan actuary from the corresponding PBGC single-employer plan termination rates depending on the period left until retirement (Ab. Doc. No. 15).

[148] *Persons not Qualified to Participate in the Plan.* "Whether portions of the actuarially determined unfunded vested benefits and/or liability relate to persons not otherwise qualified to participate in the Plan." (Ab. Doc. No. 23 at A-243).

The Board of Trustees holds, based on the information available, that the actuarially determined unfunded vested benefits do not include amounts with respect to persons not qualified to participate in the Plan.

Gray has not identified any inaccuracy in the determination of vested benefits in that regard nor has Gray provided any additional relevant information in that regard.

"Employee" is defined at Plan Section 1.06 (Ab. Doc. No. 27) as an employee performing one or more hours of work of the type covered by the Collective Bargaining Agreement, employee-members of Union or Local Unions and certain supervisory employees pursuant to regulations adopted by the Trustees. The term employee is further defined at that section to exclude "any self-employed person, whether a sole proprietor or a partner."

Employer contributions and Plan benefits are based on covered hours of service reported on the monthly employer remittance report. Instruction No. 6 of the report provides that "Contributions from self-employed carpenters cannot be accepted." (Ab. Doc. No. 27.) During June, 1980, all [149] employers were again advised that "owner-operators" are not eligible to participate in the Pension Trust Fund as they do not qualify as an "employee." (Ab. Doc. No. 27.)

Trust Fund remittance reports are reviewed by Fund Manager personnel to determine whether contributions are being made on other than employees as a function of the name of the business entity and the individuals being reported on. It is possible that certain employees with respect to which contributions have been made do not qualify as employees under the Plan. To the extent any such persons have been identified, they are not included in the unfunded vested benefit figures reported by the actuary.

Transfer to R. A. Gray Plan. "Whether a transfer from the Plan to the R. A. Gray Plan would be appropriate" (Ab. Doc. No. 23 at A-244.)

The Board of Trustees holds that a transfer of Plan assets and liabilities to the R. A. Gray money purchase pension plan may be appropriate but should be delayed pending issuance of PBGC asset transfer regulations in light of the noncomparability of the two plans. The Board of Trustees further holds that any such transfer is irrelevant to a determination of Gray's withdrawal liability as only funded benefits could be transferred to a money purchase pension plan.

As a part of Gray's collective bargaining agreement termination, it established a money-purchase pension plan which [150] covers in part employees who continued Gray employment after the contract termination date and were previously covered under the Carpenters Pension Plan. Gray has provided a summary of plan provisions (Ab. Doc. No. 26 at A-270) but has not provided a copy of the plan.

ERISA Section 4234 provides that

"A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which

"(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities and

"(2) operate and are applied uniformly with respect to each proposed transfer * * *."

The Board of Trustees has not yet adopted any asset transfer rules.

ERISA Section 4234(a)(2) provides that plan asset transfer rules consistent with ERISA Section 4232(c)(3) are considered to satisfy the asset transfer rules requirements. ERISA Section 4232(c)(3) provides that the value of liabilities transferred must not exceed the value of liabilities for benefits which accrued under the multiemployer plan and the value of assets transferred must be substantially equal to the value of assets which would have been in the single-employer plan if the employer had maintained and funded the single-employer plan as a separate plan before the date of the transfer. ERISA Section 4232(f)(1) provides that the PBGC may [151] prescribe by regulation additional requirements with respect to asset or liability transfers as may be necessary to protect the interests of plan participants and beneficiaries and the PBGC.

ERISA Section 4212(e) [sic, should be "4211(e)"] provides that, in the case of a transfer of liabilities to another plan incident to an employer's withdrawal, the withdrawn employer's liability is to be reduced in an amount equal to the value at the end of the last plan year before the withdrawal of the transferred unfunded vested benefits. Thus, even if there is a transfer of liabilities and assets, Gray's withdrawal liability to the Carpenters Pension Plan is reduced only to the extent that unfunded liabilities are transferred to Gray's money purchase pension plan.

It is doubtful that any unfunded liabilities could be transferred to the Gray money purchase pension plan. By definition, a money purchase pension plan is at all times fully funded because plan liabilities equal the sum of participants' accounts. Absent a PBGC regulation in this area, there appears to be no way to make a transfer to the Gray money purchase pension plan other than a transfer of funded vested benefits.

Even if assets and an equal amount of liabilities were to be transferred, the transfer would be limited to the value of the annuity benefits of those Carpenters Pension Plan participants who had a Gray money purchase pension plan account. Such a transfer appears unfair to remaining [152] Carpenters Pension Plan participants as it would further dilute the funding level of their benefits while the transferred participants' benefits would be fully funded.

Furthermore, before any transfer could be considered it would be necessary to review the Gray money purchase pension plan itself to determine that it permitted such transfers, and that amounts transferred would be fully vested for the former Carpenters Pension Plan participants rather than being subject to the described graded vesting schedule.

Permanent Termination of Contribution Obligation. "Whether there was a permanent termination of an obligation to contribute and if so, when?" (Ab. Doc. No. 23 at A-244.)

The Board of Trustees holds that Gray terminated its obligation to contribute to the Pension Trust Fund effective June 1, 1980. The Board of Trustees further holds that whether such termination was "permanent" is irrelevant although the termination was permanent June 1, 1980, and if not then by at least June 20, 1980.

ERISA Section 4203(b)(2) provides that a withdrawal occurs by a building and construction industry employer from a building and construction industry plan if

"(A) an employer ceases to have an obligation to contribute under the plan, and

"(B) the employer—

"(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or [153]

"(ii) resumes such work within five years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of resumption."

There is no requirement that the employer "permanently" ceases to have an obligation to contribute for a withdrawal to occur from a building and construction industry plan. The

ERISA Section 4203(a)(1) "permanently ceases" requirement applies only to nonbuilding and construction industry employers.

The phrase "obligation to contribute" is defined at ERISA Section 4212(a) as

"* * * an obligation to contribute arising—

"(1) under one or more collective bargaining (or related) agreements or

"(2) as a result of a duty under applicable labor-management relations law * * *."

Gray's collective bargaining agreement was terminated by February 14, 1980, letter notice to the Oregon State Council of Carpenters effective June 1, 1980 (Ab. Doc. No. 1 and Ab. Doc. No. 28 at A-277). Before the termination date, Gray distributed financial core type information to its employees indicating a desire to go nonunion (Ab. Doc. No. 18 at A-245). Some Gray employees chose to leave Gray employment shortly after the termination rather than work under nonunion conditions (Ab. Doc. No. 23 at A-245). Some 37 percent left Gray employment and a majority were employed by other bargained [154] employers and some 63 percent stayed with Gray on a nonbargained basis (Ab. Doc. No. 28 at A-277).

There have been no negotiations between the Carpenters Union and Gray since early June, 1980 (Ab. Doc. No. 23 at A-246), if then. It does not appear that there were even negotiations in June, 1980, as the Union took a Master Labor Agreement or nothing approach (Ab. Doc. No. 4). Any correspondence between the Union and Gray was for information regarding the statewide agreement and did not amount to negotiations. The Master Labor Agreement was ratified and negotiations regarding that agreement completed as early as June 15, 1980 (Ab. Doc. No. 6).

Any picketing which has occurred appears to be informational rather than organizational or regarding an ongoing contract issue. Picket signs indicated that Gray had no contract with the Union (Ab. Doc. No. 28 at A-277). Although Gray performed bargaining-unit type work without a labor agreement after May 31, 1980 (Ab. Doc. No. 13 at A-66),

Gray reported to the Fund Manager that it employed no Union carpenters (Ab. Doc. No. 9) as early as July, 1980.

Even if the correspondence between Gray and the Union in early June, 1980, amounted to negotiations, they ceased as of June 20, 1980, when Gray unilaterally implemented its June 5, 1980, proposal (Ab. Doc. No. 3) retroactive to June 1, 1980 (Ab. Doc. No. 5).

[155] Gray, in fact, has made no contributions to the Pension Trust Fund since those in July, 1980, for prior hours (Ab. Doc. No. 8 at A-43 and A-44) indicating that Gray has taken the position that it had no duty to contribute under applicable labor-management relations law at least by July, 1980. As there were no ongoing negotiations in June, 1980, and Gray did not subsequently become signatory to a labor agreement, Gray had no labor-management relations law obligation to contribute for June, 1980, hours. It is not clear whether Gray's contributions in July, 1980, were for June, 1980, hours or pre-June, 1980, hours. If for June, 1980, hours, any such contributions were made by mistake and are returnable to Gray on demand within six months of the date the Board of Trustees decides they were mistaken unless Gray has a delinquency for pre-June, 1980, hours. An audit would be necessary for the Board of Trustees to determine whether the contributions received in July were proper or mistaken. Gray in fact failed to contribute for June hours to the related vacation and apprenticeship and training trust funds as required by the prior master labor agreement indicating Gray did not believe there was an ongoing contribution obligation under the prior agreement for even June, 1980.

Gray neither notified the Board of Trustees nor provided it with any information tending to indicate that the termination of its labor agreement was other than permanent, [156] even if permanence is relevant. In response to Board of Trustees' inquiry, Gray notified the Board of Trustees in September, 1980, that it was making its final employer report, no carpenters were employed in July, 1980, and Gray did not anticipate employing any carpenters in the future (Ab. Doc. No. 9). Gray must have been referring to not employing union carpenters as Gray admitted hiring carpenters

after May 31, 1980 (Ab. Doc. No. 13 at A-63). By the June 12, 1981, letter to the Oregon State Council of Carpenters, Gray counsel indicated that the parties had not communicated for a substantial period of time and Gray assumed that the State Council no longer claimed to represent a majority of Gray employees (Ab. Doc. No. 23 at A-247).

The permanence of Gray's termination of its labor agreement and the lack of any duty to contribute under labor-management relations law is further indicated by Gray's establishment of a new money purchase pension plan effective March 1, 1980, to cover the former bargaining-unit carpenters (Ab. Doc. No. 28 at A-277 and A-278). The money purchase pension plan applied apparently beginning June 1, 1980, to the 67 percent of Gray's carpenters who were subject to the union's jurisdictional claims and continued employment with Gray (Ab. Doc. No. 28 at 278). The former bargained carpenters were also apparently covered by Gray under a pre-existing profit sharing plan effective June 1, 1980 (Ab. Doc. No. 28 at A-277 and A-278).

[157]

OREGON-WASHINGTON CARPENTERS- EMPLOYERS PENSION TRUST FUND

R. A. GRAY & CO.

WITHDRAWAL LIABILITY
DETERMINATIONBOARD OF TRUSTEES
ERISA SECTION 4219(b)(2)(A)
REVIEW

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[160] SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
Attorneys At Law

June 5, 1980

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

HAND DELIVERED

Oregon Council of Carpenters
United Brotherhood of Carpenters
& Joiners of America
411 N.E. 12th Avenue
Room 105
Portland, Oregon 97232

Re: R. A. Gray & Co.

Gentlemen:

Please find enclosed proposal of R. A. Gray & Co. After you have had a chance to review it, please call so that we can discuss it and make arrangements for meetings as necessary.

Very truly yours,

/s/

THOMAS M. TRIPLETT

TMT-AG
ENCL.

* * *

[162] SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
Attorneys At Law

June 11, 1980

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

Oregon Council of Carpenters
United Brotherhood of Carpenters
& Joiners of America
411 N.E. 12th Avenue
Room 105
Portland, Oregon 97232

Re: R. A. Gray & Co.

Gentlemen:

On June 5, 1980, a written proposal was submitted to you on behalf of R. A. Gray & Co. To date, no response has been received. Please be advised that unless a contrary agreement is reached between R. A. Gray and the Union prior to June 20, 1980, its proposal will be implemented on that date, effective June 1, 1980. Option A on Pension and Health and Welfare benefits will be implemented for hours worked during the month of June. Effective July 1, 1980 Option B will be implemented. With respect to vacation contributions, this will be implemented on the basis of the cash in lieu and/or the payroll savings plan as indicated by individual employees.

We would hope to hear from you prior to June 20 in order to conclude an agreement. Of course, if no agreement has been reached by June 20, and implementation, as set forth above, is therefore required, it will be without prejudice to such agreement as future negotiations may produce.

Very truly yours,

/s/

THOMAS M. TRIPLETT

* * *

TMT/baw

[167] SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
Attorneys At Law

June 12, 1981

[PORTION OF LETTERHEAD OMITTED IN PRINTING]

Oregon State Council of Carpenters
411 N.E. 12th Avenue, Room 105
Portland, Oregon 97232

Re: R. A. Gray & Co.

Gentlemen:

We have not heard from you for a substantial period of time. It is the desire of R. A. Gray to make an increase which is similar to that set forth in the AGC contract.

It is our assumption that you no longer claim to represent a majority of the employees and therefore would not protest making the aforementioned increase. If I am wrong in this regard, I would request that you verbally advise the undersigned no later than June 16, 1981.

Very truly yours,

/s/

THOMAS M. TRIPLETT

TMT/baw

* * *

PORTLAND, OREGON

February 16, 1982

TRANSCRIPT OF HEARING IN CHAMBERS

[CAPTION OMITTED IN PRINTING]

BEFORE: The Honorable James A. Redden, United States District Judge.

APPEARANCES: Mr. Thomas M. Tripplett, of attorneys for Plaintiff;

Mr. William B. Crow, of attorneys for Defendant Oregon-Washington Carpenters-Employers Pension Trust Fund.

[2] (TUESDAY, FEBRUARY 16, 1982, the following proceedings took place in chambers:)

THE COURT: All right.

MR. CROW: What Tom told me about his client's plan, as I understand it, Tom, although you gave notice of an intent to arbitrate, you reviewed your thinking and you are going to accept the trustees' findings?

MR. TRIPPLETT: Yes. I sent to the Court, I believe, the material that constituted the findings of the trustees. They found the termination occurred on June 1, 1980, and that the termination was a permanent cessation.

The other matter which is a review pertained to the appropriateness of the action of the actuary in determining the total withdrawal liability and the allocations of that liability to my client.

They also concluded that they lacked jurisdiction over the constitutional question, therefore refrained from answering that issue. I was curious to find precisely what their opinion would be; and, had it been unconstitutional, I would have accepted that determination as well.

In any event, it appears to me that there is therefore no need to arbitrate because the fact findings, [3] we are prepared to adopt. Therefore, we come squarely to the constitutional question and would thus request the matter be put

on the calendar for oral argument on the constitutional issue.

THE COURT: Okay.

MR. CROW: My response on behalf of PBGC, I talked to Mr. Fellner today and in light of what Tom said, what I reported to him, PBGC would like to respond with a memorandum of its own. It has not addressed this issue as we have. And he hadn't had time to consider the timing.

I suggested to him the only representation I would make under the circumstances was they needed not less than 30 days to file a brief.

THE COURT: What is their brief on?

MR. CROW: On the constitutionality too. We filed a cross motion for summary judgment. They asked to defer that until the other matter has been resolved.

THE COURT: They want 30 days to file a brief?

MR. CROW: He said he may need less than 30 days.

MR. TRIPLETT: We may require some time to respond after seeing what they have to say.

THE COURT: Let's give them 30-30 and then 30 for the reply. If they are a little late, it wouldn't be too serious. Tell them we are expecting it within 30 days. [4] If it is a few days late, it is not going to create a problem.

MR. CROW: As I understand it, the constitutional issue, Tom, you are questioning is the Multi-Employer Act. Your position is withdrawal liability is constitutional. We are not to get into the questions of the procedural aspect like timing of your arbitration and that sort of thing?

MR. TRIPLETT: At this point, I think that's right. I want, before committing myself in perpetuity on that, I would like to think about the question. It does occur to me in a sense, we are not at this point questioning the arbitration process, nor are we questioning the process by which the fact determinations were made, even though they might have been an unconstitutional process. I am certain we have standing to assert those.

THE COURT: I think we discussed this before. I can't remember what the results were. Are there any more appeals? Didn't they contend there were a couple of matters pending before another court elsewhere?

MR. TRIPLETT: There are.

MR. CROW: I don't think any of these are as far along as this one.

MR. TRIPLETT: I have a list if the Court is interested. There are more than thirty cases which have [5] been filed, and the only one which is close to being at this stage is before Judge Gatzendanner in Chicago, which is a somewhat unique case in which the trustees of the Teamsters Trust and the employers joined forces and sued PBGC; all of them claiming this was unconstitutional.

And Judge Gatzendanner heard arguments on cross motions for summary judgment on January 15th in Chicago and indicated a ruling would be forthcoming within thirty days. However, I inquired today and found that thirty days has a habit of getting away from you. So there has been no ruling come down.

There is also some questions that are presented in that case which may cause procedural problems which have been encountered here.

THE COURT: We will get in touch with Judge Gatzendanner in Chicago and ask that the opinion be sent here as s-on [sic] as it is issued for whatever assistance it might be.

MR. TRIPLETT: I can assist the Court on the number of cases. I do have it. I will have to have one of my people call and give you that number.

THE COURT: All right.

[CONCLUDED]

**MEMORANDUM OPINION AND ORDER
OF DISTRICT COURT
FILED AUGUST 11, 1982
WAS APPENDED TO
JURISDICTIONAL STATEMENT
IN NO. 83-245, APP. 30A-49A**

Filed AUG 12 149 PM '82

Clerk, U.S. District Court
District of Oregon

By _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

R. A. GRAY & Co.,

PLAINTIFF,

vs.

OREGON-WASHINGTON

CARPENTER-EMPLOYERS

PENSION TRUST FUND

AND PENSION BENEFIT

GUARANTY CORPORATION,

DEFENDANTS.

Civil No. 81-912 RE
JUDGMENT

ORDERED that the defendants' motions for summary
judgment are GRANTED.

BASED on the record this action is DISMISSED.

DATED this 12 day of Aug. 1982.

/s/ _____

CLERK, U.S. DISTRICT COURT

**OPINION OF COURT OF APPEALS
FILED MAY 20, 1983 WAS
APPENDED TO JURISDICTIONAL
STATEMENT IN NO. 83-245,
APP. 1a-29a**

**JUDGMENT OF COURT OF APPEALS
ENTERED MAY 20, 1983 WAS
APPENDED TO JURISDICTIONAL
STATEMENT IN NO. 83-245,
APP. 50a**

No. 83-245 and No. 83-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION, Appellant,

v.

R. A. GRAY & COMPANY, Appellee,

and

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM

THOMAS M. TRIPLETT*
MILDRED J. CARMACK
SCHWABE, WILLIAMSON,
WYATT, MOORE & ROBERTS
1200 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 222-9981

*Counsel of Record

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No. 83-245 and No. 83-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION, Appellant,

v.

R. A. GRAY & COMPANY, Appellee,

and

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM

Appellee R. A. Gray & Company,
pursuant to Rule 16.1, Rules of the Supreme
Court of the United States, moves the court
for an order affirming the decision of the
United States Court of Appeals for the
Ninth Circuit, issued on May 20, 1983 and
reported at 705 F.2d 1502, insofar as that
decision holds that application of the

withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 et seq., to employers who withdrew from multiemployer pension plans prior to enactment of the law violates the employers' due process rights under the Fifth Amendment to the United States Constitution. This motion is made on the ground that the decision of the Court of Appeals applied proper principles of law and was clearly correct and should therefore be affirmed without need to set the case for argument.

No. 83-245 and No. 83-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION, Appellant,

v.

R. A. GRAY & COMPANY, Appellee,

and

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

ARGUMENT IN SUPPORT OF APPELLEE'S

MOTION TO AFFIRM

Introduction

On February 14, 1980, R. A. Gray ("Gray") gave notice of termination of its collective bargaining agreement, effective June 1, 1980. Termination of the collective bargaining agreement constituted a withdrawal by Gray from the multiemployer

pension plan to which it had contributed nearly \$400,000 during its 15-year membership in the plan. On September 26, 1980, the President signed into law the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") which, by its terms, imposed a mandatory additional liability on employers who had withdrawn from such plans between April 29, 1980 and the date of the law's enactment. 29 U.S.C. § 1461(e)(2)(A). Gray's withdrawal liability was later determined to amount to \$201,359. The trust document governing the plan provided:

" . . . liability of any individual employer to the Fund, or with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement"

Gray had made all required contributions.

The United States Court of Appeals for the Ninth Circuit upheld Gray's challenge to the constitutionality of the retroactive feature of MPPAA, reversing a contrary

decision by the United States District Court for the District of Oregon. The Ninth Circuit recognized that the MPPAA

" . . . comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way" 705 F.2d at 1510.

It also recognized that even a retroactive law is constitutionally valid unless the retroactive effects

" . . . are so wholly unexpected and disruptive that harsh and oppressive consequences follow" 705 F.2d at 1510.

Those standards for review of retroactive legislation under the Due Process Clause of the Fifth Amendment have been specifically approved by this court's decisions. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 at n. 13 (1977), citing *Welch v. Henry*, 305 U.S. 134, 147, reh. den. 305 U.S. 675 (1938); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

The Court of Appeals correctly concluded that MPPAA's retroactive creation of withdrawal liability was both disruptive and harsh or oppressive, and that Congress had acted arbitrarily and irrationally in including that provision in the Act.¹ The Court of Appeals' determination that the retroactive effective date of the Act is invalid should be summarily affirmed.

1. This Court's Decisions Do Not Support Retroactive Creation of Withdrawal Liability.

On occasion, this court has approved retroactive changes in certain tax laws. See, e.g., *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S.

¹The Ninth Circuit employed the four-factor retroactivity analysis adopted by the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd* 446 U.S. 359, *reh. den.* 448 U.S. 908 (1980). The *Nachman* court, in adopting that analysis, identified factors considered by this court in reviewing retroactivity challenges to regulatory legislation. 592 F.2d at 960.

134, *reh den.* 305 U.S. 675 (1938); *United States v. Hudson*, 299 U.S. 498 (1937); *Milliken v. United States*, 283 U.S. 15 (1931). It has, however, distinguished its approval of such changes from its holdings that changes in gift tax laws may not constitutionally be applied to completed gifts which were not taxable transactions when made. *Milliken v. United States*, *supra*, 283 U.S. at 21. It has never approved the retroactive creation of an entirely new liability comparable to that imposed by the MPPAA.

Nor do the decisions of the Second Circuit and the Court of Claims, discussed at pages 12 and 13 of PBGC's Jurisdictional Statement, conflict with the decision of the Ninth Circuit in this case. *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. den.* 407 U.S. 920 (1972), affirms a criminal conviction for conduct which occurred after the law's enactment.

453 F.2d at 808. In *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct. Cl.), cert. den. 398 U.S. 950 (1970), the holding is expressly limited to the situation before the court. In that case the government had helped to provide personal notice to potentially affected individuals that securities transactions they contemplated could become taxable. 420 F.2d at 726-727 and 729 at n. 6. Moreover, the taxpayer could have obtained the same security from a different seller in an exempt transaction. 420 F.2d at 727 and 731.

This case is totally different. It involves after-the-fact imposition of liability based on completed past transactions which may not even have

been voluntary,² and without any attempt whatsoever to provide individual notice to persons contemplating behavior that might later become the basis for liability.

²Withdrawal can be forced upon an unwilling employer. If any of the following occurs, the employer may not enter a renewal collective bargaining agreement: (1) the employer learns of objective evidence that the union no longer represents a majority of the employees, *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665 (2d Cir. 1970); (2) the employees petition for and have an election confirming a lack of majority status, 29 U.S.C. § 159(c)(1)(A)(ii); or (3) the employer files a petition requesting confirmation or denial through election of a majority status after receiving evidence disputing the fact of continued majority support, 29 U.S.C. § 159(c)(1)(B), *United States Gypsum Co.*, 157 N.L.R.B. 652, 61 L.R.R.M. 1384 (1966). An employer may not interfere in those procedures without committing an unfair labor practice. 29 U.S.C. § 158(a).

2. MPPAA's Retroactive Effective Date Is Clearly Disruptive of Employers' Reasonable Expectations and Does Not Protect Any Reasonable Expectations of Others.

A multiemployer pension plan is one which is designed for membership which changes over time as some employers withdraw from the plan and others join. Employers' contributions are made to a trust which is administered by trustees who owe fiduciary duties to the employee-beneficiaries. 29 U.S.C. §§ 1103, 1104; *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 334, *reh. den.* 453 U.S. 950 (1981). Prior to the enactment of the MPPAA, an employer who withdrew from such a plan and who had made all promised contributions had no further liability unless the plan was terminated within 5 years after his withdrawal. 29 U.S.C. § 1364 (1976 ed.). In that case and that case only, a

withdrawing employer could later become liable for additional contributions up to 30 percent of the employer's net worth. 29 U.S.C. § 1362(b) (1976 ed.). Only employers who qualified as "substantial employers" were required to even furnish security at the time of withdrawal.³

However, upon the enactment of MPPAA, employers who had already withdrawn from their multiemployer plans and who had incurred no liability in doing so suddenly became liable for substantial additional contributions to plans to which they had already made all contributions required by their collective bargaining agreements.

The PBGC, in its jurisdictional statement, suggests that employers in

³Gray would not have qualified as a "substantial employer." Moreover, the record in this case establishes that the Trust's financial position had been quite strong and growing stronger during the years prior to Gray's withdrawal. There was and is no reason to believe that it might terminate by 1985.

Gray's position cannot complain because they should have known that the MPPAA would pass and that when it did it would contain a retroactive effective date. The Ninth Circuit, for good reasons, rejected that very argument:

" This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the Amendments Act to pass. It would have been impossible for anyone to predict with accuracy the final outcome of the legislative process. The employers therefore relied reasonably upon their collective bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA." 705 F.2d at 1511.

No one had cited, nor has any party yet cited, any decision by this court which holds that individuals are bound, at their peril, to conform their conduct to the terms of *proposed* legislation. In fact, this court has recently pointed out the

constitutional significance of enactment as notice in regulatory legislation of this kind:

"Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods. . . ." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, reh. den. 439 U.S. 886 (1978).

"Compare the gradual applicability of ERISA, which itself is not even mandatory. At the outset ERISA did not go into effect at all until four months after it was enacted. 29 U.S.C. § 1144 (1976 ed.). Funding and vesting requirements were delayed for an additional year. §§ 1086(b), 1061(b)(2) (1976 ed.). By contrast, the Minnesota Act became fully effective the day after its passage. The District Court rejected out of hand the argument that employers were constitutionally entitled to some grace period to adjust their pension planning. . . ."

Id., 438 U.S. at 249, n. 23.⁴

MPPAA's severe disruption of employers' legitimate expectations is not required in order to protect comparable expectations on the part of anyone else. Employee beneficiaries of multiemployer plans were entitled to look to the trusts, not to individual employer-contributors, to provide them with promised benefits. The trustees, in turn, could only have legitimately expected to rely on contributions from current members of the plan (or, if the plan terminated, from

⁴*Allied Structural Steel* was decided under the Contract Clause. However, substantially the same protection against Congressional impairment of contractual relationships is available under the Due Process Clause of the Fifth Amendment. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 278 at n. 31 (1969).

Certainly if notice is significant under the Contract Clause, which is an express restriction on substantive power, it should also be significant under the constitutional protection against the deprivation of property without due process of law.

certain recently-withdrawn substantial employers).

Moreover, Congress made no attempt to limit the retroactive application of MPPAA's withdrawal liability to situations in which there was any danger that the employee-beneficiaries' legitimate expectations of the plan might not be met. The substantial (and in some cases massive) withdrawal liabilities were retroactively and automatically imposed without requiring any showing that the plan was likely to be in need of contributions beyond those contracted for, and without any provision to insure that those additional contributions would be applied to reduce the plan's

unfunded vested liabilities.⁵

3. The Consequences of the Retroactive Application of MPPAA Withdrawal Liability Are Harsh and Oppressive.

MPPAA's retroactive imposition of withdrawal liability arbitrarily imposes a substantial liability on a specific group of employers -- those who withdrew from multiemployer plans between April 29, 1980 and September 26, 1980. That additional liability bears no relationship to actual needs of either the plans or their beneficiaries. It is designed to benefit persons who were never employed by those

⁵Withdrawal liability must be assessed under the MPPAA whether or not the plan needs the funds to remain actuarially sound. Because the trustees have a fiduciary duty to act solely on behalf of the beneficiaries, see p. 10, *supra*, it would be perfectly consistent with the duties of the trustees of a financially healthy plan to use withdrawal liability payments to provide larger benefits rather than to reduce the level of unfunded liability. The trustees might reasonably conclude that their fiduciary duty to the beneficiaries required them to do just that.

employers. It is not a recompense for harm resulting from the employers' business activities. Those employers could not avoid the liability by taking steps available after enactment to other employers.

In *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 18, this court held that liability could be imposed on mine operators whose former employees suffered from black lung disease without violating the Due Process Clause. It said:

"We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers"

It distinguished *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935), in which a unanimous court had held invalid a retroactive provision of the Railroad Retirement Act of 1934, because:

" The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored -- to allocate to the mine operator an actual, measurable cost of his business." 428 U.S. at 19.

This case is not like *Turner Elkhorn Mining*. The employers subjected to retroactive withdrawal liability under MPPAA are not being required simply to assume liability for "disabilities" created by their employment of Trust beneficiaries or to satisfy a "specific need" created by their business. Instead they are required to contribute to the plan's trust fund, without any showing of need, simply to provide a nonspecific supplement to the fund's other income.

Moreover, this imposition of liability is without any "mitigating provisions" comparable to those which have convinced

courts that legislation challenged on similar grounds would pass constitutional muster. Unlike ERISA's provisions for termination liability to single-employer plans, there is no limitation of liability to a percentage of the employer's net worth, no limitation of liability in terms of the vested plan benefits employed as a measurement, and no insurance to protect against withdrawal liability. Those mitigating provisions have been called "perhaps the most important facts distinguishing" ERISA's termination liability provisions from the Minnesota statute held invalid in *Allied Structural Steel Co. v. Spannaus, supra. Nachman Corp. v. Pension Benefit Guaranty Corporation*, 592 F.2d 947, 962 (7th Cir. 1979), quoted with apparent approval in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 367 at n. 12, *reh. den.* 448 U.S. 908 (1980).

Reported instances of withdrawal liability under MPPAA have been substantial and, in some cases, crippling and probably fatal to the employer's business.⁶ Whether or not Congress may validly impose such liabilities on employers who withdrew from their multiemployer plans after the enactment of MPPAA, and who therefore at least had notice and the opportunity to consider other alternatives, it can hardly be said that imposing such liabilities on employers who did not have that opportunity is

⁶See e.g., 127 Cong. Rec. S11629-30 (Oct. 19, 1981 daily ed.), statement of Sen. Hatch (\$8 million, exceeding by \$4.4 million liquidated employer's remaining assets and \$16.6 million, far exceeding company's net worth); *Victor Construction Co. v. Construction Laborers Pension Trust for Southern California*, C. Dist. Calif. No. CV 81-5144-CHH(Gx) (\$77,360.94; 26.6 percent of net worth); *Shelter Framing Corp. v. Pension Benefit Guarantee Corp.*, 705 F.2d 1502, 1506 (9th Cir. 1983) (\$797,648; approximately 180 percent of net worth); *Id.*, 705 F.2d at 1506 (\$687,387; approximately 40 percent of net worth or installment payments of 94 percent of net income in most recent fiscal year).

anything other than harsh. Given the fact that under the terms of the MPPAA the liability must be imposed without regard to either the need of the plan or the responsibility of the individual employer for such need as may exist, it is difficult to see how it could be argued to be anything other than oppressive.

4. Congress Acted Arbitrarily in Making the Withdrawal Liability Provisions of MPPAA Retroactively Effective as of April 29, 1980.

Congress has never explained or justified its decision to apply the MPPAA withdrawal liability retroactively. The Congressional committee reports do not discuss or attempt to explain any provision

for retroactivity.⁷ The only hints in the legislative history are references by individual Senators to "opportunistic employers" who might have withdrawn while Congress was considering the bill if it had not carried a retroactivity provision, 126 Cong. Rec. S10156 (July 29, 1980) and to the abandonment of the first-proposed retroactive date of February 27, 1979 because of political pressures from employers who had withdrawn after that date and because it had "served its purpose."

⁷ However, nine members of the House Committee on Education and Labor did express doubts about the validity of the Act's alteration of contracts:

"There remains the constitutional question of whether by legislation the contract of the employer can be changed from a promise to make certain contributions to a plan to a promise to pay the nonforfeitable pensions under a plan regardless of the inequities, cost, or other consequences to the employer." 1980 U.S. Code Cong. & Adm. News, p. 2988.

Id. at 10101, S10157. No explanation for the April 29 date was offered.

There was never any showing of the actual existence (or number) of such "opportunistic employers" nor any explanation why, if the original effective date had "served its purpose" a substitute period of retroactivity was required. If the employers who withdrew between February 27, 1979 and April 29, 1980 did so for reasons other than opportunism, Congress was offered no basis for assuming that opportunism was any more to be feared thereafter.

CONCLUSION

The Court of Appeals applied appropriate standards of review and correctly concluded that under principles approved by the decisions of this court the MPPAA's retroactive imposition of withdrawal liability violated the Due Process Clause

of the Fifth Amendment. Its decision was correct and should be summarily affirmed.

Respectfully submitted,

SCHWABE, WILLIAMSON,
WYATT, MOORE & ROBERTS
THOMAS M. TRIPLETT
MILDRED J. CARMACK

By:

Thomas M. Triplett
Of Attorneys for
Appellee

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MOTION FILED
SEP 23 1983

No. 83-245

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION
and OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellants,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF OF G & R ROOFING COMPANY AS
*AMICUS CURIAE***

MICHAEL E. MERRILL, Esq.
MERRILL AND SCHULTZ
4420 Hotel Circle Court
Suite 345
San Diego, California 92108
(619) 293-3722

Counsel for Amicus Curiae

No. 83-245

IN THE
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OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION
and OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellants,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

G & R Roofing Company ("G & R") respectfully moves the Court for leave to file the attached brief *amicus curiae*.¹ In support of this motion, G & R states:

¹ Pursuant to Sup.Ct.R. 36.1, counsel for G & R requested the consent of counsel for the parties to the filing of a brief *amicus curiae* in this case. Counsel for appellant, Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to the filing of the brief, necessitating this motion. Counsel for appellant, Pension Benefit Guaranty Corporation ("PBGC"), and for appellee have consented to the filing of the brief.

G & R Roofing Company is a California corporation and a contractor engaged in the building and construction industry. G & R is an appellee and cross-appellant in the consolidated appeal resulting in the opinion of the court of appeals which is sought to be reviewed here. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983). In that decision, the court of appeals struck down as unconstitutional the imposition of withdrawal liability on G & R, as well as the other employer parties, Shelter Framing Corporation and R.A. Gray & Company. The withdrawal liability was assessed under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. § 1381 *et seq.* (Supp. V 1981), for withdrawals from multiemployer pension plans before the enactment date of the statute on September 26, 1980, but after its retroactive effective date of April 29, 1980.

On July 1, 1980, G & R terminated its collective bargaining relationship with the Carpenters' union. On September 2, 1981, the Carpenters Pension Trust for Southern California ("CPT") assessed a withdrawal liability against G & R in the amount of \$687,387. The lump sum withdrawal liability totaled 40% of the company's net worth. If G & R paid the withdrawal liability on an installment basis, the annual liability would represent 94% of G & R's net income during the 1981 year. *Shelter Framing*, 705 F.2d at 1506 (Appellant's App. A 7a-8a).²

The appeal seeks to reverse the court of appeals' decision holding the retroactive imposition of withdrawal liability to be unconstitutional. G & R has an essential and unique interest in the appeal. G & R's request for leave to file the attached brief *amicus curiae* is made in furtherance of that interest.

G & R seeks by the brief *amicus curiae* to suggest to the Court that it defer consideration of the jurisdictional statement in this case of nationwide importance until the court of appeals has disposed of the petition for rehearing filed by CPT in the court of appeals and has considered a subsequently filed petition for certiorari.³ This suggestion is made

² "Appellant's App." refers to the appendix to the appellant's jurisdictional statement.

³ Before the notice of appeal in this case was filed, CPT filed a petition for rehearing and suggestion for rehearing *en banc* from the court of appeals' decision. That petition is still pending. If the petition is denied, counsel for G & R has been advised that CPT will

in order that the Court will have the opportunity to consider the entire decision of the court of appeals, including the record in all cases consolidated for the decision which appellant now seeks to have the Court review prematurely on appeal. Appellant PBGC has not advised the Court of the premature procedural posture of the appeal in its jurisdictional statement. Because G & R believes that the appellee will not fully present the view of G & R that the Court should defer consideration of the jurisdictional statement, it is important that the position taken in the attached brief *amicus curiae* be considered by the Court.

Accordingly, G & R respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

Michael E. Merrill, Esq.
MERRILL AND SCHULTZ
4420 Hotel Circle Court
Suite 345
San Diego, California 92108
(619) 293-3722

Counsel for *amicus curiae*

(Footnote 3 continued from page 2)

petition for certiorari in this Court. If the petition for rehearing is granted, and the panel decision is reversed (which would undoubtedly moot PBGC's appeal), G & R will file a petition for certiorari.

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No. 83-245

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION
and OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellants,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICUS CURIAE G & R ROOFING COMPANY

INTEREST OF THE AMICUS CURIAE

G & R Roofing Company ("G & R") is an appellee and cross-appellant in the decision of the court of appeals which is sought to be reviewed on appeal. A claim for withdrawal liability has been assessed against G & R in the amount of \$687,387.¹ As will be more fully developed *infra*, the trial court declared and the court of appeals affirmed that the retroactive

¹ Appellant Pension Benefit Guaranty Corporation ("PBGC") incorrectly states that G & R's assessed withdrawal liability is \$208,774. (Appellant's App. E at 60a)

imposition of withdrawal liability against G & R and another employer, Shelter Framing Corporation ("Shelter Framing"), under the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. § 1381 *et seq.*, (Supp. V 1981), was unconstitutional under the fifth amendment to the United States Constitution. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir. 1983). In the same decision, the court of appeals reversed the trial court ruling in the *R.A. Gray & Company* ("R.A. Gray") case. G & R will therefore be substantially affected by the Court's ultimate decision in this case.

This Court has not been fully informed in the jurisdictional statement of the piecemeal nature of this appeal, the potential for duplicating efforts of the Court and the court of appeals below, and the potential for mootness of the appeal. This brief is submitted to advise the Court of the awkward procedural posture of the appeal and to urge the Court to withhold consideration of the jurisdictional statement and the setting of oral argument until the full decision and record of the court of appeals is before the Court.

ARGUMENT

A. THE PROCEDURAL POSTURE OF THE APPEAL.

1. The G & R and Shelter Framing Proceedings

On August 28, 1981 and October 27, 1981, Shelter Framing and G & R, respectively, filed complaints in the United States District Court for the Central District of California. Both complaints challenged the constitutionality of retroactive imposition of withdrawal liability by the Carpenters Pension Trust for Southern California ("CPT"). *Shelter Framing*, 705 F.2d at 1506 (Appellants App. A at 8a). G & R was assessed a withdrawal liability in the amount of \$687,387 and Shelter Framing was assessed a withdrawal liability in the amount of \$797,648. Both employers had withdrawn from CPT prior to the September 26, 1980 enactment date of MPPAA, but before the retroactive effective date of the statute, which was April 29, 1980. 29 U.S.C. § 1461(e)(2)(A) (Supp. V 1981). The complaints in both cases challenged the imposition of withdrawal liability under MPPAA on numerous constitutional grounds. MPPAA was challenged on the grounds that the statute takes plaintiff's

property without a hearing, it denies plaintiff access to the courts, it denies plaintiff an impartial tribunal, it takes plaintiff's property without just compensation, it denies plaintiff due process through its retroactive application, all in violation of the fifth amendment, and it denies plaintiff its right to a jury trial under the seventh amendment.

The actions were consolidated for hearing and decision by the trial court. On January 14, 1982, the trial court granted a preliminary injunction enjoining CPT from any further attempts to enforce or collect the withdrawal liability assessments. The injunction also enjoined CPT from any efforts to arbitrate any dispute against the employers under the arbitration scheme of MPPAA.

On February 22, 1982, PBGC filed a motion to intervene in the actions for the purpose of urging the trial court to dismiss or stay the actions pending exhaustion of the MPPAA arbitration scheme. On March 15, 1982, the trial court denied PBGC's untimely attempt to intervene. On March 22, 23, and 24, 1982, the trial court heard the parties' motions and cross-motions for summary judgment. On April 13, 1982, the district court entered its judgments declaring that the retroactive imposition of withdrawal liability for withdrawals which occurred prior to the enactment date, but before the retroactive effective date of MPPAA, was unconstitutional under the fifth amendment. The trial court rejected the other grounds asserted in the complaints that MPPAA is unconstitutional, but it withheld ruling on the issue as to whether the imposition of withdrawal liability was a taking of property without just compensation. The district court's written decision was filed on July 9, 1983. *Shelter Framing*, 543 F.Supp. at 1234.

On March 17, 1982, PBGC filed appeals from the denial of intervention. Those appeals were docketed as Case Nos. 82-5271 and 82-5272.

On May 11, 1982, CPT filed notices of appeal from the trial court's judgments. Case Nos. 82-5460 and 82-5461. On May 24, 1982, G & R filed a notice of cross-appeal from the trial court's judgment. Case No. 82-5462.

By order dated June 16, 1982, the appeals in Case Nos. 82-5460, 82-5461, and 82-5462 were consolidated. That order allowed CPT to file an opening brief and a combined answering reply brief totaling 90 pages. *Shelter Framing* was allowed to file an answering brief totaling 50 pages. G & R was allowed to file a combined answering and opening

brief and a reply brief totaling 95 pages. (The order appears in Appendix A to this brief.)

2. The R.A. Gray Proceedings

On September 29, 1981, R.A. Gray filed its complaint in the United States District Court for the District of Oregon against the Oregon-Washington Carpenters-Employers Pension Trust Fund and PBGC. The complaint sought a declaration that the imposition of withdrawal liability in the amount of \$201,359 was unconstitutional on the grounds that the retroactive application violated the fifth amendment, it impaired contract rights, it denied equal protection, and that the MPPAA arbitration scheme denied procedural due process and a trial by jury. On August 12, 1982, the trial court entered judgment against R.A. Gray, rejecting all of the constitutional arguments advanced. *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F.Supp. 531 (D. Or. 1982), *rev'd*, 705 F.2d 1502 (9th Cir. 1983) (Appellant's App. B at 30a-47a). On September 10, 1982, R.A. Gray filed its notice of appeal. Case No. 82-3506. On October 28, 1982, the court of appeals entered an order expediting the briefing schedule of the parties in order that the appeal could be heard before the same panel which would hear the appeals in the *G & R* and *Shelter Framing* cases. (The order appears in Appendix B to this brief.) The order limited all parties' briefs to 20 pages, and directed that they address only one issue: the retroactive application of MPPAA.

3. Further Proceedings and the Opinion of the Court of Appeals

On December 7, 1982, the court of appeals heard oral argument in all of the foregoing appeals. On May 20, 1983, the court of appeals entered its opinion in which it stated that the several appeals "are consolidated for disposition by this opinion." *Shelter Framing*, 705 F.2d at 1504 n.3 (Appellant's App. A at 4a n.3). The court of appeals noted that the constitutionality of the retroactive application of MPPAA was the subject of "extensive nationwide litigation." *Id.*, at 1504 & n.2 (Appellant's App. A at 3a & n.2).² The court of appeals affirmed the denial of intervention

² PBGC's appendix lists 140 litigations involving the constitutionality of MPPAA. (Appellant's App. E at 53a-75a).

to PBGC in the *G & R* and *Shelter Framing* cases, and rejected the argument that the employers were required to exhaust the MPPAA arbitration scheme prior to challenging the constitutionality of the statute. *Id.*, at 1508-09 (Appellant's App. A at 13a-15a).

The court of appeals held that retroactive application of MPPAA to the employer parties who withdrew prior to the enactment date of the statute but after its retroactive effective date was unconstitutional under the fifth amendment. *Id.*, at 1514-15 (Appellant's App. A at 27a). The court found it unnecessary to reach the other constitutional attacks on the statute which were raised by *G & R* in its cross-appeal. *Id.*, at 1515 (Appellant's App. A at 27a).

The court devoted extensive attention to the facts in the *G & R* and *Shelter* cases and a mere two paragraphs to the *Gray* facts. *Id.*, at 1505-07 (Appellant's App. A at 6a-10a). Numerous references are made to the decision of the trial court in the *G & R* and *Shelter Framing* cases in its analysis of the constitutional issue.³

On June 3, 1983, CPT filed a petition for rehearing and suggestion for rehearing *en banc*. On June 15, 1983, PBGC filed its notice of appeal in this Court under 28 U.S.C. § 1252 (1976). On or about June 27, 1983, after being granted an extension, PBGC filed its petition for rehearing and suggestion for rehearing *en banc* from that portion of the court of appeals' decision which affirmed the trial court's denial of intervention in the *G & R* and *Shelter Framing* cases.

As of this date, the court of appeals has not disposed of the petition for rehearing and suggestion for rehearing *en banc* filed by CPT in Case Nos. 82-5460, and 82-5461, nor by PBGC in Case Nos. 82-5271 and 82-5272.

B. CONSIDERATION AND EXERCISE OF JURISDICTION IN THE APPEAL SHOULD BE DEFERRED.

The appeal seeks to review the decision of the court of appeals in only one of several consolidated appeals. At the same time, the decision of the court of appeals in the *G & R* and *Shelter Framing* cases is pending on

³ Contrary to Sup.Ct.R. 15.1(j)(ii), PBGC did not include the trial court's decision in the *G & R* and *Shelter Framing* cases in its appendix.

petitions for rehearing and suggestions for rehearing *en banc*. In the interest of conserving the scarce judicial resources of this Court and due to the potential for mootness of the appeal, consideration of the jurisdictional statement should be deferred until the Court has before it all of the parties to the decision below.

Sup.Ct.R. 11.3 suggests this result. The rule extends the filing date of a notice of appeal where other parties to the decision below have filed a petition for rehearing which is pending. In those circumstances, the time for filing a notice of appeal does not begin to run until the petition for rehearing filed by other parties in the case has been resolved. The obvious intent of this rule is to avoid piecemeal appeals and to conserve judicial resources.

Other important reasons require that consideration of the jurisdictional statement in this appeal be deferred. If the Court considers the appeal at this stage, it will not have the benefit of the record in the *G & R* or *Shelter* cases. That record was relied upon heavily by the court of appeals in its decision. The Court will be denied the benefit of the views of all parties to the decision below.⁴ The *G & R* case, and only that case, raises the full spectrum of constitutional arguments attacking MPPAA.⁵

Finally, the Court must consider the potential for mootness of the appeal. If the court of appeals denies CPT's petition for rehearing and suggestion for rehearing *en banc*, CPT will petition for certiorari.⁶ On the other hand, should the petition for rehearing be granted and the subsequent decision uphold the constitutionality of MPPAA, the appeal

⁴ The *R.A. Gray* parties were limited to expedited and cursory brief presentations in the court of appeals. (Appendix B).

⁵ *G & R* will also argue that the court of appeals decision is correct on the basis that MPPAA is unconstitutional because it takes plaintiff's property without a hearing, it denies plaintiff access to the courts, it denies plaintiff an impartial tribunal, it takes plaintiff's property without just compensation, and that it denies plaintiff its right to a jury trial.

⁶ Counsel for *amicus curiae* has just received the decision of the Fourth Circuit Court of Appeals in *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, Case Nos. 83-1054, 83-1109, 83-1119 and 83-1196 (4th Cir. Sept. 9, 1983). Contrary to the Ninth Circuit, the Fourth Circuit held that retroactive imposition of MPPAA withdrawal liability is constitutional, thereby creating a conflict in the circuits. The rendition of this decision lends emphasis to CPT's stated intention to file a petition for certiorari in the event of a denial of its petition for rehearing.

would undoubtedly be moot. This waste of judicial resources can be avoided by deferring consideration of the jurisdictional statement.

In similar circumstances, the Court has deferred consideration of a petition for certiorari. *United Housing Foundation, Inc. v. Forman*, 419 U.S. 1120 (order granting certiorari), *decision on merits*, 421 U.S. 837 (1975). In that case, one party to the decision in the court of appeals petitioned for certiorari, while other parties filed a petition for rehearing from the decision of the court of appeals. After the court of appeals denied the petition for rehearing, the other parties filed a petition for certiorari to review the same decision of the court of appeals. Upon motion to defer consideration of the first petition for certiorari until the second petition was distributed to the Court, the motion was granted and the cases were considered and decided together.

CONCLUSION

The legal, economic, and social significance of issues created by MPPAA pension fund withdrawal liability are of paramount national importance. There is a swelling tide of litigation across the country and each of those cases presents potentially drastic effects upon employers, trust funds, individual employees, and labor unions.

It is imperative that review by this Court has as its foundation the fully developed records of all three cases represented in the decision under appeal. Only in the light of those full records can the contrasting conclusions of the trial courts in the *R.A. Gray* and *G & R Roofing and Shelter Framing* cases be adequately analyzed. The case records under the trial court decision in *G & R Roofing and Shelter Framing* are elements integral to the consolidated decision by the Ninth Circuit. Consideration of the *R.A. Gray* case alone will unavoidably handicap this Court in

reaching a meaningful evaluation of those factors which shaped the decision below.

Respectfully submitted,

MERRILL AND SCHULTZ

Michael E. Merrill, Esq.

Counsel for *Amicus Curiae*

APPENDIX A

FILEDUNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 16 1982

SHELTER FRAMING CORPORATION,)

Plaintiff-Appellee,)

vs.)

CARPENTERS PENSION TRUST FOR)
SOUTHERN CALIFORNIA,)

Defendant-Appellant.)

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Nos. 82-5460

82-5461

82-5462

D.C. # C-81-4457 IH

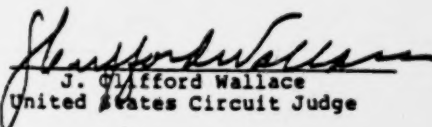
C-81-5551 IH

ORDER

A prebriefing conference in these appeals was held by telephone on June 10, 1982 by Conference Attorney Richard G. R. Schickele. The Carpenters Pension Trust for Southern California was represented by James P. Watson and Howard Kroll, Shelter Framing Corp. was represented by Cathryn M. Brogan, and G & R Roofing Co. was represented by Michael E. Merrill. Baruch Fellner participated in the conference on behalf of the Pension Benefit Guaranty Corporation. On the basis of the discussion at the conference and a review of the docketing statements the court issues the following order.

- (1) These appeals are consolidated;
- (2) the reporter's transcript has been ordered and completed;
- (3) appellant Carpenters Pension Trust shall file an opening brief of not more than 40 pages on or before August 10, 1982;
- (4) should the Pension Benefit Guaranty Corporation decide to file an amicus curiae brief, it shall do so on or before August 24, 1982 and its brief shall consist of no more than 40 pages if it discusses both the constitutional issues and the exhaustion issues and shall not exceed 25 pages if only the exhaustion issues are briefed;
- (5) appellee Shelter Framing shall file an answering brief of not more than 50 pages on or before September 27, 1982;
- (6) appellee-cross appellant G & R Roofing shall file a combined answering and opening brief of not more than 80 pages on or before September 27, 1982;

- (7) appellant Carpenters Pension Trust shall file a combined reply and answering brief of not more than 50 pages on or before October 18, 1982;
- (8) cross-appellant G & R Roofing may file a reply brief of not more than 15 pages on or before October 25, 1982;
- (9) if the parties adhere to this briefing schedule, the court shall attempt to calendar these appeals for consideration in December 1982; and
- (10) the parties may on or before November 24, 1982 file supplemental memoranda of not more than 5 pages limited to alerting the court to recently decided cases and suggesting a division of argument.


J. Clifford Wallace
United States Circuit Judge

FILED

OCT 23 1982

APPENDIX B

JAMES B. WILGARY
- DEPUTY CLERK OF APPEALSUNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R.A. GRAY AND CO.,

Plaintiff-Appellant,

vs.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND AND
PENSION BENEFIT GUARANTY CORPORATION,

Defendants-Appellees.

No. 82-3506

D.C. # CV -
81-912

ORDER

DOCKETED

PAGE FILE

On October 21, 1982, a Prebriefing Conference was held by telephone before Conference Attorney Norman P. Vance. Appellant was represented by Mildred J. Carmack, appellee Trust Fund was represented by William B. Crow and David S. Paull, and appellee PBGC was represented by Baruch A. Fellner.

- (1) With the consent of the panel, this appeal shall be argued together with *Shelter Framing Corp. v. Pension Benefit Guaranty Corporation*, Nos. 82-5271 & 82-5272, and *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, Nos. 82-5460, 82-5461 & 82-5462.
- (2) Argument in all six appeals will be held in Los Angeles on Tuesday, December 7, 1982, at 1:00 p.m. The panel may hereafter establish time limits for argument.
- (3) On or before November 19, 1982, the parties in this appeal may file briefs not to exceed 20 pages addressing the constitutionality of the retroactive application of the Multiemployers Pension Plan Amendments Act of 1980. Supplemental briefs addressing the remaining issues in the case may be filed after argument if so ordered by the panel.
- (4) Appellant shall file its nondesignation of reporter's transcript on or before November 5, 1982, and the parties shall file their

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respective designations of clerk's record on or before November 12, 1982. The clerk of the district court is requested to forward the record on appeal as soon as practicable.

- (5) This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/

Norman P. Vance
Conference Attorney

SEP 21 1983

ALEXANDER L. STEVAS,
CLERK

No. 83-245

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION
and OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellants,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

**SUPPLEMENT TO BRIEF OF *AMICUS CURIAE*
G & R ROOFING COMPANY**

MICHAEL E. MERRILL, Esq.
MERRILL AND SCHULTZ
4420 Hotel Circle Court
Suite 345
San Diego, California 92108
(619) 293-3722

Counsel for Amicus Curiae

No. 83-245

IN THE
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PENSION BENEFIT GUARANTY CORPORATION
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Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

**SUPPLEMENT TO BRIEF OF *AMICUS CURIAE*
G & R ROOFING COMPANY**

On September 14, 1983, G & R Roofing Company ("G & R"), pursuant to Sup. Ct. R. 28.2 and 36.1, filed its motion for leave to file a brief *amicus curiae* and filed its brief *amicus curiae*.¹

¹ G & R's motion for leave to file its brief *amicus curiae* is pending before the Court. If the Court grants that motion, it is further respectfully requested that the Court grant G & R leave to file this supplement to its brief *amicus curiae*.

G & R urged the Court to withhold consideration of the jurisdictional statement and the scheduling of oral argument in this case until the United States Court of Appeals for the Ninth Circuit ruled on the Carpenters Pension Trust for Southern California's petition for rehearing and suggestion for rehearing *en banc* in *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983).

On September 13, 1983, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. A copy of the Ninth Circuit's order is attached hereto as an appendix. That order was not received by counsel for G & R until September 15, 1983, after the aforementioned motion and brief *amicus curiae* were filed with the Court.

The fact that the Ninth Circuit has now denied the petition for rehearing and rejected the suggestion for rehearing *en banc* further supports G & R's suggestion that the Court defer consideration of the jurisdictional statement. Counsel for G & R has been advised that the Carpenters Pension Trust for Southern California intends to promptly file a petition for a writ of certiorari with this Court, giving the Court an opportunity to review the full decision and record of the court of appeals in the *Shelter Framing Corp.* case.

Respectfully submitted,

MERRILL AND SCHULTZ

Michael E. Merrill, Esq.

Counsel for *Amicus Curiae*

APPENDIX

A-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 13 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

SHELTER FRAMING CORPORATION,

Plaintiff/Appellee,

vs.

CARPENTERS PENSION TRUST FOR SOUTHERN
CALIFORNIA,

Defendant/Appellant.

No. 82-5460

ORDER

G&R ROOFING COMPANY,

Plaintiff/Appellee,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN
CALIFORNIA,

Defendant/Appellant.

No. 82-5461

Judges Wright, Kennedy and Boochever vote to deny the Petition for Rehearing and to reject the Suggestion for Rehearing En Banc filed by Carpenters Pension Trust for Southern California.



Nos. 83-245, 83-291

Office - Supreme Court, U.S.
FILED

DEC 12 1983

ALEXANDER C. STEVAS.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF FOR APPELLANT
PENSION BENEFIT GUARANTY CORPORATION**

HENRY ROSE
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
TERENCE G. CRAIG
DAVID F. POWER
DEBRA N. DIENER
Attorneys

Of Counsel:

NATHAN LEWIN
SETH P. WAXMAN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400

PENSION BENEFIT GUARANTY
CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-4864

QUESTION PRESENTED

Whether, in enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress could constitutionally provide that it take effect on a date prior to its enactment to prevent frustration of the law's rational purposes.

PARTIES TO THE PROCEEDING

The Pension Benefit Guaranty Corporation, appellant in No. 83-245, is a United States government agency created by 29 U.S.C. § 1302(a).

The Oregon-Washington Carpenters-Employers Pension Trust Fund, appellant in No. 83-291, is a multiemployer pension plan, as that term is defined in 29 U.S.C. § 1301(a)(3) (Supp. V 1981).

Appellee R.A. Gray & Co. is a building and construction firm doing business in Tigard, Oregon.*

* This case was heard by the United States Court of Appeals for the Ninth Circuit together with other appeals raising similar and related issues. The parties in the other proceeding—who are also parties to No. 83-507, which is pending on Petition for a Writ of Certiorari—are: the Carpenters Pension Trust for Southern California, a multiemployer pension plan, petitioner in No. 83-507; and Shelter Framing Corporation and G&R Roofing Company, two California building and construction firms, respondents in No. 83-507.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-245, 83-291

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF FOR APPELLANT
PENSION BENEFIT GUARANTY CORPORATION**

OPINIONS BELOW

The opinion of the court of appeals (reprinted in our Jurisdictional Statement, hereinafter "J.S.," App. A, pp. 1a-29a) is reported at 705 F.2d 1502. The opinion of the district court (J.S., App. B, pp. 30a-49a) is reported at 549 F. Supp. 531.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. The Pension Benefit Guaranty Corporation (the "PBGC"), an agency of the United States gov-

ernment, filed a notice of appeal to this Court on June 15, 1983. The Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund") filed a notice of appeal to this Court on June 20, 1983. The PBGC filed its Jurisdictional Statement on August 15, 1983, and the Trust Fund filed its Jurisdictional Statement on August 19, 1983. This Court noted probable jurisdiction on October 17, 1983. The Court has jurisdiction under 28 U.S.C. § 1252 (1976). The district court had jurisdiction of this action under 29 U.S.C. § 1451(c) (Supp. V 1981).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by the Multiemployer Pension Plan Amendments Act of 1980* (the "Multiemployer Act"), 29 U.S.C. §§ 1001-1461 (1976 & Supp. V 1981), are set forth in the Appendix ("App.") 13a-74a.

STATEMENT

On September 26, 1980, following almost seventeen months of congressional consideration and debate, the President signed the Multiemployer Act into law. Among other things, the Act imposes liabilities on certain employers that withdraw from multiemployer pension plans. In this way, Congress sought to protect the financial stability of multiemployer plans and the retirement income security of millions of participants by ensuring that those employers that withdraw from such plans continue to fund their share of the plans' liabilities. The Act's withdrawal liability provisions (29 U.S.C. §§ 1381-1405 (Supp. V 1981)) were made effective as of April 29, 1980—almost one year after the bill was introduced in the Congress and less than five months prior to its adoption by the Congress and the President's signing. *Id.* § 1461(e) (2) (A).

The only issue on this appeal is whether the statutory withdrawal liability may constitutionally be assessed

against an employer that withdrew from a multiemployer plan¹ during the final weeks of the legislative process. The district court rejected the "retroactivity" challenge made by the appellee employer (J.S. 34a-43a), but the court of appeals held that "retroactive application of the [Multiemployer] Act violated the employers' rights to due process as guaranteed by the fifth amendment" (J.S. 27a). As background for our submission that the court of appeals erred, we outline briefly the history and purposes of the Multiemployer Act, as well as the undisputed record facts regarding the appellee's withdrawal from its multiemployer pension plan.

1. *Congress Prescribes Pension Insurance*

In 1974 Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381 (1976), to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of private pension plans, ERISA established a system of pension benefit insurance. Substantial public concern had been expressed over tragedies suffered by thousands of American workers, whose expectations of receiving promised pensions had been shattered by the insufficient funding of their pension plans. See, e.g., 1 *Legislative History of the Employee Retirement Income Security Act of 1974* (1976) ("Leg. Hist.") 212-214 (Sen. Bentsen). Perhaps the most notorious example involved the 1964 closing of the Studebaker plant in South Bend, Indiana. When the pension plan was terminated, its assets were insufficient to pay all claims. On distribution of the

¹ A multiemployer plan is defined as a plan to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. 29 U.S.C. § 1301(a)(3) (Supp. V 1981). Approximately two thousand such plans provide pension coverage to eight million American workers and their families.

plan's assets, 4,000 employees between 40 and 60 years of age, with vested rights, received only 15 percent of their anticipated benefits. Approximately 2,900 employees under the age of 40—some of whom also had vested rights—received nothing. 1 *Leg. Hist.* at 214.

As a result of many such experiences, Congress made pension benefit insurance mandatory. ERISA's legislative findings state, *inter alia*, "that owing to the termination of the plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits" (29 U.S.C. § 1001(a) (1976)) and that it is the policy of the Act (*id.* § 1001(c))

to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries . . . by requiring plan termination insurance.

Title IV of ERISA created the PBGC, a wholly-owned government corporation and a federal agency. Title IV of ERISA assigned to the PBGC the task of administering a program of insurance to cover the payment of certain pension benefits to participants in terminated plans. 29 U.S.C. § 1302(a) (1976). The 1974 law provided that if a pension plan subject to Title IV terminated with insufficient assets to provide "nonforfeitable" benefits guaranteed under 29 U.S.C. § 1322 (1976),² the

² Under regulations promulgated by the PBGC, benefits are nonforfeitable under Title IV if

on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

29 C.F.R. § 2613.6(a) (1981). This Court upheld the PBGC's construction of this term in *Nachman Corp. v. Pension Benefit Guar-*

PBGC would become responsible for the payment of such guaranteed benefits. *Id.* § 1361.

For a pension plan that was maintained by a single employer, the PBGC's obligation to pay guaranteed benefits was effective immediately. *Id.* § 1381.³ The PBGC was required to collect any shortfall, subject to statutory limitations, from the employer that terminated an underfunded single-employer plan. *Id.* § 1362(b).

Under ERISA as enacted in 1974, however, guaranteed payment of multiemployer plan benefits was not to become mandatory until January 1, 1978. *Id.* § 1381(c)(1).⁴ In the intervening period, the PBGC was authorized to determine on a case-by-case basis whether to pay benefits upon multiemployer plan termination. *Id.* § 1381(c)(2). If the PBGC exercised its discretion to pay guaranteed benefits, employers who had contributed to the plan during the five-year period preceding its termination were liable to the PBGC in amounts proportional to their shares of the plan's contributions during that period.

anty Corp., 446 U.S. 359 (1980), *reh'g denied*, 448 U.S. 908 (1980). See also 29 U.S.C. § 1301(a)(8) (Supp. V 1981).

³ More than 100,000 participants in terminated single-employer plans are now eligible to receive guaranteed benefit payments from the PBGC. PBGC, *Annual Report to the Congress FY 82 6-7* (1983) (App. 2a).

⁴ Mandatory payment was deferred because of Congress' uncertainty about the impact of termination insurance on multiemployer plans. *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess. (1980) ("House Labor Hearings") 361 (Secretary of Labor Ray Marshall); *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, Committee on Labor and Human Resources, United States Senate, 96th Cong., 2d Sess. 8 (Comm. Print 1980).

Id. § 1364. Thus, after the enactment of ERISA in 1974, any employer withdrawing from a continuing multi-employer plan had a contingent liability which depended upon whether the plan survived the next five years and on whether the PBGC assumed discretionary responsibility to pay the plan's guaranteed benefits.⁵

2. Congress Scrutinizes The Multiemployer Pension Benefit Insurance Program

In 1977, Congress became concerned that the January 1, 1978 implementation of mandatory guarantees for multi-employer plans might induce several large multiemployer plans to terminate, subjecting the insurance system to a liability that would have "an adverse impact on the entire private pension system." 123 Cong. Rec. S18637 (daily ed. Nov. 3, 1977) (Sen. Bentsen). *See also* 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (Sen. Javits). Congress directed the PBGC to prepare a comprehensive report analyzing the problems of multiemployer plans, and it delayed the effective date of the mandatory guarantees, extending the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977) (App. 75a-76a).⁶

⁵ The PBGC has extended coverage to over 5,000 participants in several terminated multiemployer plans under the discretionary coverage program.

⁶ The effective date for mandatory coverage of multiemployer plans was subsequently deferred to May 1, 1980 (Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979) (App. 77a)), to July 1, 1980 (Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980) (App. 78a)), and to August 1, 1980 (Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980) (App. 79a)). In each instance the purpose was to provide more time for thorough congressional consideration of the PBGC's report and of subsequent legislative proposals. Mandatory coverage was ultimately superseded by the Multiemployer Act.

The PBGC's report, issued on July 1, 1978, included the following findings:⁷

1. ERISA covered approximately two thousand multi-employer pension plans with 8 million participants. *PBGC Study 1*, 20 (1155, 1174).

2. About ten percent of all multiemployer plans, covering 1.3 million participants, were experiencing financial difficulties that could result in plan terminations before 1988. *PBGC Study 1*, 138 (1155, 1290). Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately 4.8 billion dollars, and necessitate an increase in premiums to unacceptable levels. *PBGC Study 2*, 16, 139 (1156, 1170, 1291).⁸

3. Existing law, if continued, would encourage the termination of multiemployer pension plans because ERISA limited the plans' authority to reduce benefits, and the availability of a PBGC guarantee made termination an attractive alternative whenever the cost of funding a plan became high and the industry was declining. *PBGC Study 4*, 24, 49, 51-52 (1158, 1178, 1203, 1205-06).⁹

⁷ The report (Pension Benefit Guaranty Corporation—Multiemployer Study Required by P.L. 95-214—July 1, 1978) was reproduced at pages 1149-1481, *House Labor Hearings*, *supra* note 4. It is cited herein as "*PBGC Study* — (—)," with the first number referring to the referenced page of the original study and the number in parentheses to the page of the volume of congressional hearings.

⁸ The cost to the insurance system of funding all benefits guaranteed under the plans projected to become insolvent before 1988 could be approximately \$560 million. The annual per capita premium needed to fund this liability could rise from fifty cents to as much as nine dollars. *PBGC Study 2*, 16, 140 (1156, 1170, 1292).

⁹ The limitation of an employer's liability to 30 percent of its "net worth," 29 U.S.C. § 1362(b)(2) (1976), was also an incentive for employers to terminate their plans rather than to continue funding them. See *PBGC Study 51* (1205); 126 Cong. Rec. S11668 (daily

The greatest threat to the solvency and stability of existing multiemployer pension plans was employer withdrawals—i.e., employers' termination of participation in their plans. The PBGC's Executive Director explained the problem to Congress as follows (*Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 2d Sess. 22 (1978)):

A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

The PBGC Study, as described by the Executive Director, had proposed a mechanism to remedy this situation (*id.* at 23):

To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim

ed. Aug. 26, 1980) (Sen. Javits); H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. Code Cong. & Ad. News 3001. An employer's low net worth may not accurately reflect its capacity to meet its funding obligations. See Report to the Congress by the Comptroller General of the United States, *Legislative Changes Needed to Financially Strengthen Single Employer Pension Plan Insurance Program* 42-44 (Nov. 14, 1983) (30% net worth limitation enables employers to "take advantage of" the single-employer insurance system) (App. 8a-12a).

against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. Of course, where a withdrawal is caused by employer bankruptcy, the plan would probably have to absorb the costs that cannot be paid out of the employer's assets.

We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan.¹⁰

¹⁰ "The committee believes that . . . present law provides an undesirable incentive for employers to withdraw from plans and an unfair burden on the employers who continue to maintain the plans." H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 10, *reprinted* in 1980 U.S. Code Cong. & Ad. News 3001. "Under the current rules, when a contributor to a multiemployer plan withdraws from the plan, its share of the funding burden must be picked up by the remaining employers. Thus withdrawals contribute to the escalation of contribution rates and unfairly burden remaining contributors with unfunded benefit obligations left behind by the withdrawn employer." H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 60, *reprinted* in 1980 U.S. Code Cong. & Ad. News 2928. "Generally the question is whether an employer withdrawing from the plan pays a share of the total unfunded benefits or whether the employer[s] who stay in the plan pick up this liability. Current law provides that the remaining employers pick up the liability and, generally, the bill forces withdrawing employers to pay their share." 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (Sen. Dole).

Indeed, several employer associations testified before Congress in support of withdrawal liability. *See, e.g., Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, 96th Cong., 2d Sess. (1980) ("Senate Finance Hearing")* 155 (National Construction Employers Council); *id.* 215 (Food Marketing Institute); *see also id.* 281 (Bituminous Coal Operators Association).

See also House Labor Hearings, supra note 4, at 481-482 (Secretary of Labor Marshall); *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate, 96th Cong., 1st Sess. (1979) ("Senate Labor Hearings")* 123-124 (Secretary of Labor Marshall).

In light of the PBGC's warnings, Congress debated the consequences of employer withdrawals from multiemployer pension plans, particularly in declining industries. *See, e.g.,* H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 63 (1980); 126 Cong. Rec. S10113-14 (daily ed. July 29, 1980) (Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980). Congress recognized that the absence of effective withdrawal liability permitted an employer to "withdraw from a plan leaving unfunded benefit obligations for his employees which must be paid by the remaining employers in the plan," and encouraged a "last man out" mentality, with employers withdrawing from plans to avoid possible plan termination liability." *Id.* at S10100 (Sen. Javits).

3. A Bill Is Proposed And Considered By Congress

The PBGC submitted legislative recommendations to Congress on February 27, 1979. *Id.* at S10131 (Sen. Javits). Those recommendations were incorporated in an Administration bill that was formally sent to Congress on May 3, 1979. The original bill contained an effective date for employer withdrawal liability of February 27, 1979—the date of the PBGC's submission of its recommendations. This was designed to prevent employers from taking advantage of "the lenient rules in [then] current law" by withdrawing while the legislation was under consideration. *Id.* at S10156 (Sen. Matsunaga).¹¹

Congress thereafter studied and revised the Administration's proposal. Four separate congressional committees held hearings on the bill, and numerous witnesses testified.¹² By April 29, 1980, substantially identical bills had

¹¹ See also *House Labor Hearings*, *supra* note 4, at 788 (June 5, 1979 statement of Bert Seidman, Director, Department of Social Security, AFL-CIO).

¹² *House Labor Hearings*, *supra* note 4; *Senate Labor Hearings*, *supra* note 10; *Senate Finance Hearing*, *supra* note 10; *Multiemployer Pension Plan Termination Insurance Program: Hearing Be-*

been approved by two committees in the House and one in the Senate.¹³ All contained the originally suggested effective date for withdrawal liability. When the Senate Finance Committee, the last of the four congressional committees responsible for the legislation, indicated it needed more time, Congress delayed the mandatory payment of multiemployer plan benefits provided in ERISA from May 1 to July 1, 1980. Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980). The Finance Committee stressed, however, that it did not want to encourage employers to withdraw from multiemployer plans while additional work was being done on the bill. Senator Bentsen, who was chairman of the Subcommittee on Private Pension Plans, said on the Senate floor on April 29, 1980 (126 Cong. Rec. S4302-03 (daily ed.)):

The feeling of the Senate Finance Committee was that this bill should not encourage employers to withdraw from a multiemployer plan between now and July 1, 1980. Any withdrawals after April 28, 1980, will be covered by any withdrawal liability rules that the committee might adopt.

The Finance Committee amended the bill to move the effective date for withdrawal liability to April 29, 1980, in order to avoid imposing liability on certain employers

for the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, 96th Cong., 1st Sess. (1979) ("1979 House Ways and Means Hearing"); The Multiemployer Pension Amendments Act of 1979: Hearing Before the Committee on Ways and Means, House of Representatives, 96th Cong., 2d Sess. (1980) ("1980 House Ways and Means Hearing").

¹³ The Senate Committee on Labor and Human Resources approved a bill on March 24, 1980. 126 Cong. Rec. D414 (daily ed.). The House Committee on Education and Labor reported its bill on April 2, 1980. 126 Cong. Rec. H2489 (daily ed.) (Rep. Perkins). The House Committee on Ways and Means amended that bill and reported its version on April 23, 1980. 126 Cong. Rec. H2879 (daily ed.) (Rep. Ullman). All of the above approved versions of the bill contained an effective date of February 27, 1979.

"that had been caught by the earlier date." *Id.* at S10101 (daily ed. July 29, 1980) (Sen. Javits). Testimony before the Finance Committee in February 1980 had suggested that the original effective date of February 27, 1979, had been unfair to such employers. One employer urged the House Ways and Means Committee and the Senate Finance Committee that it was inequitable to impose liability on a partial withdrawal "which was publicly announced and commenced prior to the introduction of the substantive provisions regarding partial withdrawal liability." The employer asserted that it had "acted in complete good faith on the basis of the state of the law and general public knowledge at the time." *Senate Finance Hearing, supra* note 12, at 173; *see also* 1980 *House Ways and Means Hearing, supra* note 12, at 111.

4. Congress Adopts The Multiemployer Act

On May 22, 1980, the House passed by a vote of 374-0 its version of the bill, containing the original February 27, 1979 effective date for withdrawal liability. 126 Cong. Rec. H4170 (daily ed.). After a further postponement of the mandatory guarantee program to August 1, 1980, Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980), the Senate passed its version by a vote of 85-1 on July 29, 1980. 126 Cong. Rec. S10169 (daily ed.). The Senate adopted the April 29, 1980 effective date for the withdrawal liability provisions, having concluded that "the original purpose of a retroactive date—namely to avoid encouragement of employer withdrawals while the bill was being considered—ha[d] been achieved." *Id.* S10101 (Sen. Javits).¹⁴ The conference committee accepted the

¹⁴ Despite the apparently limited impact of this change, several Senators felt strongly that the change was inequitable, because it permitted employers who had withdrawn between February 27, 1979 and April 28, 1980 to escape their funding responsibilities and transfer them to remaining employers. 126 Cong. Rec. at S10156 (daily ed. July 29, 1980) (Sen. Matsunaga); *id.* at S10101 (Sen. Javits). Indeed, the Multiemployer Act provided that withdrawals from one particular plan would be subject to withdrawal liability

Senate's effective date, and the President signed the Multiemployer Act into law on September 26, 1980.¹⁵

5. *Gray Withdraws From Its Pension Plan*

The Trust Fund was established with a Trust Agreement dated December 19, 1962, which was amended on August 1, 1968 (Joint Appendix, hereinafter "J.A.", 111) and several times thereafter (J.A. 113). The Fund is administered pursuant to a "Revised Pension Plan" (J.A. 116), which took effect on July 1, 1976 (J.A. 90), and has been amended six times since that date (J.A. 98).

if they had occurred after May 3, 1979. 29 U.S.C. § 1381 note (Supp. V 1981). Debate in the Senate demonstrated that permitting employers who had withdrawn from the plan during Congress' deliberations to escape mandatory liability would impose substantial new funding burdens on remaining employers. 126 Cong. Rec. at S10156-58 (Sen. Matsunaga).

¹⁵ In addition to imposing withdrawal liability (29 U.S.C. § 1381 (Supp. V 1981)) on certain employers that withdraw from multiemployer plans (*id.* § 1383), the Multiemployer Act made other changes in ERISA. Among the principal revisions were (1) a reduction in the level of benefits guaranteed by the PBGC (*id.* §§ 1322a, 1322b), to discourage reliance on plan termination and the PBGC guarantee; (2) authorization to plan sponsors to reduce benefits in certain circumstances and to suspend payments when funds are unavailable (*id.* §§ 1425, 1426); (3) an increase in the annual per capita premium paid by multiemployer plans to \$1.40, with further increases to \$2.60 authorized over a nine-year period (*id.* § 1306); (4) reduction of the time period over which benefits provided by multiemployer plans must be funded (*id.* § 1082; 26 U.S.C. § 412), in order to protect the insurance system, participants, and remaining employers; and (5) authorization to the PBGC to provide financial assistance to insolvent plans, even if they have not been terminated, thereby allowing employers to continue contributions to an insolvent plan without incurring liability (29 U.S.C. § 1431 (Supp. V 1981)). Two plans with over 10,000 participants have received loans from the PBGC under the Multiemployer Act's insolvency insurance program.

The Pension Plan is a multiemployer "defined benefit" plan within the meaning of 29 U.S.C. § 1301(a) (3) (Supp. V 1981) (J.A. 6, 103, 129). It is a "building and construction industry plan" within the meaning of 29 U.S.C. § 1383(b) (1) (Supp. V 1981) (J.A. 6, 103-04, 129, 132). The Trust Agreement specifies that the Trust Fund is to be administered by a ten-member board of trustees, of whom five are to represent employers and the other five to represent employees (J.A. 120).

The appellee, R.A. Gray & Co. ("Gray"), is a construction employer that has entered into collective bargaining agreements with the Oregon State Council of Carpenters (J.A. 16-18). Pursuant to these agreements, Gray contributed to the Pension Plan to finance pension benefits provided under the Revised Pension Plan (J.A. 1, 2, 14, 104). The Carpenters Master Labor Agreement was executed by the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (an employer association) and by the Oregon State and Southwest Washington District Councils of the United Brotherhood of Carpenters and Joiners of America (a national union) (J.A. 17), and adopted by Gray (J.A. 16).

In February 1980, Gray advised the Oregon State Council of Carpenters that it would be terminating its collective bargaining agreement effective June 1, 1980 (J.A. 19). Correspondence over new proposals for a labor contract ensued (J.A. 105, 156, 159, 160). Gray proposed to change pension and vacation benefits (J.A. 160). No agreement was reached, and Gray unilaterally implemented its proposals "without prejudice to such agreement as future negotiations may produce" (J.A. 160). Gray withdrew by ceasing to contribute to the Plan while continuing to engage in the building and construction industry in competition with contributing employers (J.A. 9, 105, 143, 153-54, 154-55). See 29 U.S.C. § 1383(b) (Supp. V 1981).

6. *The Pension Plan Assesses Withdrawal Liability*

Pursuant to 29 U.S.C. §§ 1382 and 1399(b) (1) (Supp. V 1981), the Pension Plan notified Gray in a letter dated July 24, 1981, that Gray was deemed to have withdrawn from the Pension Plan as of June 1, 1980, and that it had incurred a withdrawal liability of \$201,359 (J.A. 8-12). The notice set out a schedule of quarterly payments and demanded payment in accordance with that schedule (J.A. 12).

Gray then requested additional information, which the Pension Plan provided (J.A. 22-23, 25-33). However, Gray did not begin payments in accordance with the schedule (J.A. 7). In a letter dated September 25, 1981, the Pension Plan informed Gray that it was delinquent in its payments and that it would be in default if payment were not made within 60 days (J.A. 20, 34).

7. *Gray Litigates Its Liability*

Gray filed suit for declaratory and injunctive relief against the Pension Plan and the PBGC on September 29, 1981 (J.A. 1-5). In its early pleadings, Gray challenged the withdrawal liability provisions of the Multiemployer Act on constitutional grounds (J.A. 3-4) and asserted, as well, that it had not "withdrawn" from the Pension Plan (J.A. 2-3). Subsequently, Gray asserted that the liability determination was erroneous (J.A. 35, 41). Gray's request for a preliminary injunction was denied by the district court, which concluded that the issue of Gray's withdrawal was particularly suitable for the statutory arbitration remedy (J.A. 55). Gray thereafter expressly waived its right to seek arbitration (*see* 29 U.S.C. § 1401 (a) (1) (A) (Supp. V 1981)) and accepted the Pension Plan's findings, including its determination that Gray had withdrawn (J.A. 162).¹⁶

¹⁶ In response to Gray's request for review, the Plan had issued its "Decision on Review," pursuant to 29 U.S.C. § 1399(b) (2) (B) (Supp. V 1981) (J.A. 142-161).

The district court then considered Gray's constitutional claim, which included an attack on the retroactive provision of the Multiemployer Act involved in this appeal as well as Gray's more general challenge to employer withdrawal liability. The district court found the Multiemployer Act to be constitutional in all respects and granted the defendants' motions for summary judgment (J.S. 49a, J.A. 166).

The Ninth Circuit heard Gray's appeal on December 7, 1982.¹⁷ The court of appeals reversed the district court on the ground that the April 29, 1980 effective date for withdrawal liability was an unconstitutional denial of due process of law (J.S. 27a, 50a).

SUMMARY OF ARGUMENT

The issue in this case is whether the Constitution bars congressional legislation regulating pre-enactment conduct that could thwart the legislation's objectives. It is not a case in which Congress has attempted, with a new law, to impose unanticipated economic consequences on commercial transactions that had been concluded long before the law was contemplated, introduced or debated. Congress acted prospectively so as to affect those employers who might, in the future, terminate their participation in federally insured multiemployer pension plans. Recognizing, however, that the public process of legislation takes time, Congress was concerned that employers might race to alter their existing legal relationships so as to avoid the remedial impact of the new law. In order to prevent that consequence, Congress selected a date—long after the proposed legislation was introduced and after it had been substantially debated—as the effec-

¹⁷ The court heard at the same time the appeals in *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California* and *G&R Roofing Co. v. Carpenters Pension Trust for Southern California*, as well as the PBGC's appeals of the district court's denials of motions by the PBGC to intervene in those cases. J.S. 1a.

tive starting point for the crucial remedial provision of the law. Although this date was earlier than the formal enactment of the law and preceded by almost five months the President's signing of the bill, it was a reasonable and fair means of forestalling a flood of withdrawals during the final stages of the legislative process which would have robbed the new law of its intended remedial impact.¹⁸

¹⁸ The Fourth Circuit and a majority of district courts have upheld the retroactive application of the Multiemployer Act. See *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir.), affirming 3 Employee Benefits Cases ("EBC") (BNA) 2545 (E.D. Va. 1982), petition for cert. filed, 52 U.S.L.W. 3293 (U.S., Sept. 29, 1983) (No. 83-541); *Bakersfield Concrete Constr., Inc. v. Construction Laborers Pension Trust*, 4 EBC 1425 (C.D. Cal. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, 559 F. Supp. 1210 (N.D. Cal.), appeal docketed, No. 83-1095 (9th Cir., Apr. 22, 1983); *Coronet Dodge, Inc. v. Speckmann*, 553 F. Supp. 518 (E.D. Mo. 1982), appeal stayed, No. 82-2554-EM (8th Cir., Nov. 7, 1983); *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash.), appeal docketed, No. 82-3634 (9th Cir., Nov. 18, 1982); *Peick v. PBGC*, 539 F. Supp. 1025 (N.D. Ill. 1982), argued, No. 82-2081 (7th Cir., Apr. 13, 1983); *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F. Supp. 531 (D. Ore. 1982) (J.S. 41a); *Speckmann v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469 (E.D. Mo.), appeal stayed, No. 83-1881-EM (8th Cir. Nov. 7, 1983); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404 (S.D.N.Y. 1982), argued, No. 83-7004 (2d Cir., Oct. 3, 1983); *Transport Motor Express, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 4 EBC 1566 (N.D. Ill.), argued, No. 83-2026 (7th Cir., Aug. 10, 1983). But see *D.J. Drywall, Inc. v. Orange Belt Painters Pension Fund*, No. CV-81-5330-RJK (C.D. Cal., June 29, 1983); *Grano Steel Corp. v. Shopmen's Ironworkers Pension Plan*, No. CV-5862-LEW (C.D. Cal., Nov. 5, 1982), appeal docketed, 82-6090 (9th Cir., Dec. 15, 1982); *National Steel Serv. Center, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, No. 82-C-5315 (N.D. Ill., Nov. 23, 1983); *Republic Industries, Inc. v. New England Teamsters & Trucking Pension Fund*, Nos. 81-2551-S, -2703-S, -2738-S (D. Mass., Aug. 3, 1983), appeals stayed, Nos. 83-1657, -1658 (1st Cir., Dec. 1, 1983); *Robertson's Linen Serv. v. Central States, Southeast &*

Our argument on the constitutionality of the law addresses first the correct constitutional standard by which the Multiemployer Act must be evaluated. We show that this Court held in 1976 that retroactive federal laws

Southwest Areas Health & Welfare & Pension Fund, No. 81-74350 (E.D. Mich., Aug. 30, 1983); *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F. Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983) (No. 83-507); *Sibley, Lindsay & Curr Co. v. Bakery Workers Int'l Union*, 566 F. Supp. 32 (W.D.N.Y.), *argued*, No. 83-7328 (2d Cir., Oct. 3, 1983); *Warner-Lambert Co. v. United Retail & Wholesale Employee's Teamster Local No. 115 Pension Fund*, No. 82-1080 (E.D. Pa., Aug. 10, 1983), *appeals stayed*, Nos. 83-1676, -1682 (3d Cir., Nov. 7, 1983).

The Act's prospective operation has been unanimously upheld by the district courts that have considered it. *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Westside Bldg. Materials Corp.*, No. 82-6029KN (N.D. Cal., Aug. 17, 1983), *appeal docketed*, No. 83-6207 (9th Cir., Sept. 12, 1983); *Cleveland Metal Prods. Co. v. Teamster Local No. 507 Pension Fund*, No. C81-2543 (N.D. Ohio, June 9, 1983), *appeal dismissed*, No. 83-3581 (6th Cir., Dec. 5, 1983); *Eberhard Foods, Inc. v. RSEU & Food Employers Joint Pension Fund*, 4 EBC 1544 (W.D. Mich.), *appeal dismissed*, No. 83-1424 (6th Cir., Aug. 1, 1983); *IAM Nat'l Pension Fund v. Dormont Oldsmobile Co.*, No. 82-1737 (D.D.C., June 21, 1983); *IUE Pension Fund v. Erie Universal Prods. Corp.*, 4 EBC 1357 (D.N.J. 1983); *Kinsora v. Vornado, Inc.*, No. 82-1034 (D.N.J., Mar. 28, 1983), *appeal dismissed*, No. 83-5440 (3d Cir., Aug. 17, 1983); *Peick v. PBGC*, 539 F. Supp. 1025 (N.D. Ill. 1982), *argued*, No. 82-2081 (7th Cir., Apr. 13, 1983); *Penn Elastic Co. v. United Retail & Wholesale Employees Union, Teamster Local No. 115 Pension Fund*, No. 82-777 (E.D. Pa., Sept. 28, 1983); *S&M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867 (C.D. Cal. 1982); *Spector Red Ball, Inc. v. PBGC*, No. SA-83-CA-178 (W.D. Tex., Aug. 12, 1983), *appeal docketed*, No. 83-1621 (5th Cir., Sept. 6, 1983); *Stoeven Bros., Inc. v. California Butchers' Pension Trust Fund*, No. C-82-0558 RFP (N.D. Cal., Sept. 15, 1983); *Terson Co. v. Bakery Drivers Local 194 Pension Fund*, 4 EBC 2024 (D.N.J.), *appeal docketed*, No. 83-5655 (3d Cir., Sept. 7, 1983); *Trustees of Retirement Fund of Fur Mfg. Industry v. Lazar-Wisotsky, Inc.*, No. 82-CIV-0880 (LBS)

which change "settled expectations" based on private commercial contracts are constitutional if it was "rational" for Congress to prescribe retroactivity. The court of appeals failed to apply this rationality standard. Instead, it substituted its own judgment for Congress' on several questions of legislative policy. Since Gray cannot meet its burden of showing that Congress' selection of a retroactive effective date was "arbitrary and irrational," the Multiemployer Act must be upheld.

In addition, the court of appeals mistakenly employed standards and precedents which are applicable only in deciding whether state legislation violates the Contract Clause of Article I, Section 10 of the Constitution. That clause is wholly inapplicable to federal legislation, which, under authoritative decisions of this Court, may constitutionally override private contractual agreements.

We do not, however, rest merely on the negative proposition that the retroactivity of the Multiemployer Act has not been shown to be irrational. We demonstrate in the second portion of this brief that there was an overriding need to make the Act effective before it was finally approved by Congress and the President. Certain federal laws may be rendered meaningless if private parties are able to escape the laws by taking unilateral action before the laws are formally adopted. In the present case, if employers could have escaped the law before it was enacted, they would thereby have transferred the responsibility for funding benefits earned by their former employees to other employers—the very harm the law was

(S.D. N.Y., May 3, 1983) (memorandum endorsement of interlocutory opinion at 550 F. Supp. 35), *appeal docketed*, No. 83-7585 (2d Cir., Oct. 24, 1983); *Victor Constr. Co. v. Construction Laborers Pension Trust*, 3 EBC 1763 (C.D. Cal. 1982), *appeal stayed*, No. 82-5701 (9th Cir., Sept. 30, 1983); *Warner-Lambert Co. v. United Retail & Wholesale Employee's Teamster Local No. 115 Pension Fund*, No. 82-1080 (E.D. Pa., Aug. 10, 1983), *appeals stayed*, Nos. 83-1676, -1682 (3d Cir., Nov. 7, 1983); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 4 EBC 1145 (D.D.C.), *appeal docketed*, No. 83-1313 (D.C. Cir., Mar. 28, 1983).

designed to prevent. Consequently, the justification for retroactivity is great, and the constitutionality of this law is supported by judicial decisions upholding similar retroactivity in analogous circumstances.

Moreover, there can be no real doubt that Gray should have been on notice that its withdrawal, even if occurring prior to formal adoption of the law, could result in liability. For six years, ERISA had imposed liability on employers beyond bargained obligations. Gray had more than two years' notice that Congress was concerned with the adequacy of ERISA's regulation of multiemployer plans. Retroactivity was a feature of the Multiemployer Act from the date it was first introduced. Gray's withdrawal occurred long after the bill's initial introduction, and after the full House of Representatives and a Senate committee had approved the bill. Under these circumstances, Gray cannot successfully claim that the law was applied without prior notice.

ARGUMENT

I. THE "RETROSPECTIVE ASPECTS" OF THE MULTIEMPLOYER ACT SATISFY THE CONSTITUTIONAL TEST OF RATIONALITY

A. This Court Has Prescribed A "Rationality" Standard To Test The Constitutionality Of Retroactive Provisions Of Statutes Affecting Only Economic Interests

The law at issue is among Congress' "legislative Acts adjusting the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). It deals exclusively with a financial issue—who, if anyone, is to be responsible for the payment of money that is legally and morally due under pension plans on which employees have justifiably relied. With adoption of the Multiemployer Act's amendments to ERISA, Congress has arrived at a mechanism that distributes the

burden of paying expected benefits to participants, at least at statutorily guaranteed levels, among employers that remain in a plan, those who withdraw, and premium payers in other plans. The Multiemployer Act's amendments increased the burden on withdrawing employers, to make guarantees feasible and to distribute liability more equitably. While considering this change, Congress had to face the possibility that employers would withdraw from plans before the Act's provisions came into effect. To discourage opportunistic withdrawals, Congress made the withdrawal liability provisions effective for a limited period prior to enactment.

This allocation of economic responsibility amply satisfies the governing standard announced in this Court's decisions. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16-19, this Court held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." The Court went on to rule that the constitutionality of "retrospective aspects of legislation" is determined by whether they amount to "a rational measure" by which to spread societal costs. This Court refused in *Turner Elkhorn* independently to "assess the wisdom of Congress' chosen scheme." The applicable constitutional rule, which controls this case as well, was stated as follows (428 U.S. at 19):

It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

The imposition of withdrawal liability upon employers withdrawing from multiemployer pension plans and the decision to make such liability effective as of a time when it appeared that the law would pass were eminently ra-

tional legislative choices. In rejecting Congress' legislative determination, the court below simply substituted its own judgment for Congress'. Examination of the grounds enumerated by the court of appeals to justify its finding of unconstitutionality reveals that none of them relates to the rationality—as contrasted with the wisdom—of Congress' decision to make withdrawal liability effective as of April 29, 1980.

First, the court of appeals found that the retroactive imposition of withdrawal liability was unjustified because the liability of the three employers before the court was "relatively insignificant in terms of the plans' total unfunded vested benefits liability" (J.S. 20a). Congress, however, was concerned about the *cumulative* impact of withdrawals, and this concern was plainly rational. In ignoring this concern, the court not only disagreed with Congress' judgment, but also failed to assess the rationality of that judgment.

Second, the court of appeals concluded that "the equities weigh against retroactive application" (J.S. 26a). However, an Act of Congress does not contravene the Due Process Clause "merely because it is deemed in a particular case to work an inequitable result." *Wickard v. Filburn*, 317 U.S. 111, 129-30 (1942).

Third, the court below believed that the Multiemployer Act made "drastic legislative changes" in degree and kind in existing law (J.S. 21a, 22a). In *Turner Elkhorn*, this Court upheld a law which imposed new, unanticipated, and significant monetary liabilities. After *Turner Elkhorn*, it is clear that analysis of retroactive economic legislation must focus solely on its rationality, and not on whether less "drastic" changes would have been "wiser or more practical under the circumstances." The same failure to observe the standards of *Turner Elkhorn* is manifested in the speculation of the court below that "[o]ther legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans"

(J.S. 25a). Such a judicial inquiry was precisely what this Court rejected as "not a question of constitutional dimension" in *Turner Elkhorn*, 428 U.S. at 19.

Fourth, the court below believed that the frustration of employers' reliance on existing law was unjustified because "[i]t was not certain at the time they withdrew that the [Multiemployer] Act would be enacted and would have a retroactive effect" (J.S. 19a). Inasmuch as certainty is not a feature of the legislative process, no law with a retroactive effective date would be constitutionally permissible under the standard adopted by the court below. Moreover, because the court adopted the wrong standard, it failed to consider whether Congress might rationally have concluded that sufficient notice of probable enactment had been provided by April 29, 1980, to justify treating employers who withdrew after that date in the same manner as employers who withdrew after enactment. *See infra* pp. 35-40.

Finally, the court below undertook to appraise the adequacy of the "moderating provisions" of the Multiemployer Act (J.S. 26a-27a). Such an appraisal is applicable, if at all, only in a Contract Clause analysis, and does not address the rationality of the law's retrospective effect, but only its wisdom.

In summary, the *rationality* of the selection of April 29, 1980, as the effective date for withdrawal liability for multiemployer plans has not been successfully challenged. Only the *wisdom* of the statutory provision has been questioned by the court below. Under the governing standard of the *Turner Elkhorn* case, the judgment must be reversed.¹⁰

¹⁰ The lower court's disagreements with Congress serve only to illustrate the wisdom of judicial deference to legislative decisions. For example, in espousing variations on contingent termination liability (J.S. 25a), the court below ignored Congress' finding that such contingent liability was an *incentive*, not a deterrent, to em-

B. Contract Clause Standards Do Not Apply To Federal Enactments

Another fundamental error of the court of appeals was its invocation of constitutional principles which have been developed by this Court under the Contract Clause of Article I, Section 10 of the Constitution. Specifically, the court below concluded that the "great deference" which the *Turner Elkhorn* decision required judges to accord to Congress' judgment in allocating economic benefits and burdens had been "restricted" by this Court's ruling in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), a Contract Clause case (J.S. 23a-24a). On this basis, and on the authority of *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), the court of appeals struck down the pre-enactment effective date of the Multiemployer Act (J.S. 22a-24a).

In so doing, the court overlooked the well-established principle that the Contract Clause applies only to *state* legislation and not to federal law. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924).²⁰ The constitutional de-

ployer withdrawal. H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 60, reprinted in 1980 U.S. Code Cong. & Ad. News 2928.

Similarly, in its consideration of the equities (J.S. 22a-26a), the lower court ignored the congressionally identified interests of employers remaining in pension plans, which can be adversely affected by even a single employer's withdrawal. *See, e.g., supra* note 10. The court also ignored the congressional concern that employer withdrawals can cause harm to a pension plan even if the plan does not actually terminate. *See* 29 U.S.C. § 1001a(a)(4)(A) (Supp. V 1981).

In the same vein, the court compared the moderating provisions available under the Multiemployer Act unfavorably to those previously available under ERISA (J.S. 26a-27a). In so doing, the court simply ignored congressional and administrative findings that the 30 percent "net worth" limitation was an incentive for termination, and thus was one of the very causes of the problem Congress sought to remedy in the Multiemployer Act. *See supra* note 9.

²⁰ See also the discussion in Justice Brennan's dissenting opinion in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 256-57.

bates of the Framers leave no doubt whatever on this score. An effort to subject federal legislation impairing private contracts to the same constitutional strictures as the action of state legislatures was rejected during the constitutional debates (5 *Elliot's Debates* 546 (2d ed. 1845) (App. 1a)):

MR. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

By contrast, other enumerated governmental conduct which Article I, Section 10 barred to the states, such as bills of attainder, *ex post facto* laws, and grants of nobility, were also barred to the federal government by Article I, Section 9. Impairment of contracts was *not* included in Article I, Section 9.

The constitutional rule governing federal laws which impair private contracts was stated by this Court in *Turner Elkhorn*, 428 U.S. at 15:

[T]his Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees . . . regardless of contravening arrangements between employer and employee.

This is the standard that has been uniformly applied by this Court and lower federal courts. In *Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603 (1912), for example, the Court ignored the Contract Clause in deciding whether a federal law nullifying "any contract . . . or device" limiting or exempting the liability of a common carrier for injuries sustained by employees on the job was constitutional. When the employee in that case was injured and discovered that the contractual compensation he received did not fully compensate him, he sued under the federal statute. This

Court rejected the railroad's claim that its "liberty of contract" was violated by the federal law, observing "that if Congress possesses the power to impose . . . liability, . . . it also possesses the power to insure its efficacy by prohibiting any contract . . . in evasion of it." *Id.* at 610.²¹

Other cases in which this Court has upheld federal statutes abridging private contract rights under the traditional due process test of rationality, with no mention of the Contract Clause, include *Lichter v. United States*, 334 U.S. 742 (1948) (wartime contract providing excess profits); *Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240 (1935) (gold clause in private agreements); *Calhoun v. Massie*, 253 U.S. 170 (1920) (attorneys' fees contracts for Civil War claims); and *Louisville & Nashville Railroad v. Mottley*, 219 U.S. 467, 482-86 (1911) (passenger's contract with railroad).²² And courts of appeals have done the same. For example, the Fourth Circuit explicitly rejected a challenge based on the Contract Clause, "notwithstanding the employer and the insurer may have believed they had contractual rights in the limitation of benefits . . . when . . . they assumed these obligations. . . . for the constitutional bar to such impairment is directed only to the States." *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 381 (4th Cir.

²¹ The Court went on to explain its reasoning (224 U.S. at 614-15):

To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements.

²² Moreover, in applying the Contract Clause, this Court has implied that the Contract Clause standard is different from the due process rationality test. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 241 & n.12.

1976) (emphasis added). In *S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867, 868-71 (C.D. Cal. 1982), the court carefully considered and rejected the argument that a Contract Clause standard should be applied to the Multiemployer Act. The court said, "the Supreme Court has never held the Contracts Clause applicable to federal as opposed to state action." *Id.* at 869 (quoting *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 903 (9th Cir. 1979)).

C. The Decisions Of This Court Relied Upon By The Court Below Are Inapposite

The court of appeals relied heavily on *Allied* to justify its decision that the Multiemployer Act's retroactivity provision is unconstitutional (J.S. 23a-26a). But *Allied* involved a Contract Clause challenge to a state law which (1) was a new attempt at regulation, (2) was apparently directed at only one employer,²³ (3) affected rights that had not vested, and (4) contained no provisions moderating the law's harsh implementation. The Multiemployer Act, on the other hand, presents no Contract Clause issues, deals with a benefit guarantee program that had been in effect for six years, protects only vested rights, and includes provisions designed to moderate its retroactive impact. See *infra* note 37.

The court below also erred when it relied on this Court's ruling in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935). In its 1976 decision in *Turner Elkhorn*, this Court questioned whether *Alton* "retains vitality." 428 U.S. at 19 & n.18. The Ninth Circuit, however, concluded that this Court's decision in *Allied* revitalized *Alton*.

²³ In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, — U.S. —, 103 S. Ct. 697 (1983), this Court suggested that the statute challenged in *Allied* had been "special interest legislation" (*id.* at 708 n.25), which had been "aimed at specific employers" and "even may have been directed at one particular employer." *Id.* at 705 n.18.

Assuming that a Contract Clause ruling can revitalize a Due Process Clause decision, *Alton* is distinguishable on its facts. The law struck down there created substantive new pension rights where there had been none before. The Multiemployer Act, by contrast, merely requires a withdrawing employer to assist in the funding of pension benefits that have already vested prior to its withdrawal. In contrast to *Alton*, it cannot be said here that the ultimate payment of promised pensions effects additional payment to Plan participants for services already "fully compensated." 295 U.S. at 349. In sum, the Ninth Circuit's reliance on these cases was misplaced.

II. THE "RETROSPECTIVE ASPECTS" OF THE MULTIEMPLOYER ACT SATISFY EVEN MORE STRINGENT CONSTITUTIONAL TESTS

Although it is sufficient, for constitutional purposes, to demonstrate that the selection of April 29, 1980 as the effective date for withdrawal liability was not irrational, we do not rest our argument exclusively on this negative proposition. Rather, we now show that the retroactive aspect of the Multiemployer Act is sustainable even under standards that are more stringent than the due process rationality test. The legislative history and a sound understanding of the statutory mechanism provide substantial affirmative reasons for Congress' decision to make withdrawal liability retroactive. Hence, even if stricter criteria were to be applied, the effective date of the withdrawal liability provisions could constitutionally be fixed at a time several months before the Presidential signing of the Multiemployer Act.

A. A Brief Retroactive Period Was Essential To Discourage Last-Minute Employer Efforts To "Escape" The Effects Of The New Law

It is eminently clear from the Multiemployer Act's legislative history that Congress was motivated by sound and permissible legislative policies when it established

the effective date for employer withdrawal liability. The reasons for fixing a date prior to the final enactment of the law and its approval by the President were succinctly stated by District Judge Getzendanner in *Peick v. PBGC*, 539 F. Supp. 1025, 1055 (N.D. Ill. 1982), *argued*, No. 82-2081 (7th Cir., Apr. 13, 1983), a decision that rejected the constitutional challenge to retroactivity:

Congress was concerned that if the statute became effective only upon enactment, "opportunistic" employers would be encouraged to withdraw while Congress was still debating. See 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga); *id.* at S10101 (remarks of Sen. Javits). One of the very flaws Congress perceived in ERISA—its encouragement of early withdrawals—would thus have been perpetuated had [the Multiemployer Act] not included a retrospective date of effectiveness. Congress further realized that pre-enactment withdrawals affect equity and plan stability to the same extent as withdrawals occurring after enactment. Congress was particularly concerned with the relative equities between withdrawing and remaining employers: If pre-enactment withdrawals were excused, the firms still contributing on the date of enactment would face greater potential liabilities. See *id.* at S10101; *id.* at S10158 (remarks of Sen. Matsunaga). (Footnote omitted.)

Other courts, including the district court in this case, have cited the same reasons as ample justification for upholding this retroactive aspect of the Multiemployer Act.²⁴

²⁴ See *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d at 639; *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F. Supp. at 537 (J.S. 41a); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. at 409; *Coronet Dodge, Inc. v. Speckmann*, 553 F. Supp. at 521; *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. at 527-28; *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, 559 F. Supp. at 1214.

Congress was concerned that employers would be encouraged by the imminent prospect of the Multiemployer Act's passage to withdraw quickly from multiemployer plans. Plans already in acute financial difficulty—such as those in declining industries—were of particular concern. Congress was, for example, well aware that changes in consumer preferences, technological advances, and foreign competition resulted in declines in the number of contributing employers.²⁵ But declining industries were not the only source of potential heavy losses for the guarantee program. A process of decline might occur in other industries as the rhythms of economic change worked their inevitable effects.²⁶ Nor were the lessons of troubled plans likely to be lost on employers contributing to currently healthy plans. See 29 U.S.C. § 1001a(a)(4)(B) (Supp. V 1981). The first sign that a plan's contribution base was starting to erode as a result of employer withdrawals could create a "rush for the door," as other contributors began to withdraw in order to avoid higher funding costs and eventual liability upon plan termination. The employers who remained would then be responsible for funding the benefits earned by the employees of the withdrawn employers. See *supra* pp. 8-10 & note 10.

It was essential, therefore, to the realization of Congress' objective to deter "hasty" withdrawals that might be prompted by anticipation of the new law. 126 Cong.

²⁵ The difficulties caused by withdrawals from multiemployer plans in declining industries were discussed at length in the congressional reports and debates. See *supra* pp. 8-10 & note 10.

²⁶ See 126 Cong. Rec. E4153 (daily ed. Aug. 28, 1980, printed Sept. 3, 1980) (Rep. William Ford):

I have followed with concern the problems of a multiemployer plan in my own district that has suffered because of the decline of the American auto industry and the migration of businesses to the Sun Belt. While this plan is well run and has no unfunded liabilities, its future has been jeopardized by the threat of employer withdrawals.

Rec. S10156 (daily ed. July 29, 1980) (Sen. Matsunaga). This was achieved initially by maintaining the date of submission of the PBGC's proposal to Congress as the effective date for withdrawal liability. That date was subsequently advanced by 14 months when, in Congress' view, the later initiation of the legislative remedy sufficed to deter premature withdrawals.

Congress' effort to deter "opportunistic" conduct during the legislative process was not unique. A strikingly similar problem confronted Congress in 1963 and 1964, when the Executive Branch, in order to limit the flow of capital from the United States, sought to impose an excise tax on foreign-issue stock purchased by American citizens. On July 18, 1963, President Kennedy sent a message to Congress accompanied by proposed legislation which became the Interest Equalization Tax Act of 1964, Pub. L. No. 88-563, 78 Stat. 809 (Sept. 2, 1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 922-968, *repealed*, Pub. L. No. 94-455, 90 Stat. 1814 (Oct. 4, 1976). The bill, which was not finally enacted until September 2, 1964, applied to all transactions occurring after the date of President Kennedy's message, making the statute effectively retroactive by almost 14 months. Pub. L. No. 88-563, § 2(c); S. Rep. No. 1267, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3478, 3486, 3500.

In *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), individuals who had been convicted for evading the Interest Equalization Tax challenged its retroactivity. The Second Circuit upheld the statute's constitutionality, deferring to Congress' justification for the law's retroactivity: "[t]o curb the capital flow while Congress was considering the legislation and to avoid arbitrage speculation." 453 F.2d at 806. And the Court of Appeals for the Ninth Circuit found, as to the Interest Equalization Tax, that retroactivity was not only desirable, but essential, to implement the law's purposes:

The President in his message [proposing the tax] made it clear that if the tax was to achieve its purpose, it was essential that legislation creating the tax be made effective as of the date of the presidential message . . . otherwise a rush by investors to beat the deadline would serve to aggravate the problem and render the proposal self-defeating.

Purvis v. United States, 501 F.2d 311, 312 (9th Cir. 1974), cert. denied, 420 U.S. 947 (1975) (footnote omitted).

On a number of other occasions, this Court and other courts have approved laws with retroactive effective dates,²⁷ as well as laws retroactive not in form but in their effect on closed transactions.²⁸ The legislative dis-

²⁷ See, e.g., *United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam) (retroactive application of minimum tax provisions of Internal Revenue Code amendments); *Lichter v. United States*, 334 U.S. 742, 777, 789 (1948) (October 1942 amendments to Renegotiation Act made retroactive to date of original act in April 1942); *Fleming v. Rhodes*, 331 U.S. 100 (1947) (Price Control Extension Act backdated to cover time when original Emergency Price Control Act had expired); *United States v. Hudson*, 299 U.S. 498 (1937) (retroactive application of federal tax on silver trading); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 374 F.2d 516, 525, & n.10 (Ct. Cl. 1967) (Renegotiation Act passed in September 1954 backdated to first of year); *Eastern Machinery Co. v. Under Secretary of War*, 182 F.2d 99, 100 (D.C. Cir. 1950) (July 1943 amendment to Renegotiation Act made retroactive to April 1942).

²⁸ See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (black lung benefits extended to coal miners who had quit jobs before legislation enacted); *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (congressional modification of a statute of limitations could apply retroactively to revive barred action); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (state depression statute to protect homeowners from foreclosure held not to violate due process even though it affected already existing mortgages); *Travelers Insurance Co. v. Marshall*, 634 F.2d 843 (5th Cir. 1981) (expansion of death benefits for longshoremen held constitutionally applicable to those injured before amendment expanding benefit was

ruption of an employer's expectations which are settled by a closed transaction is not constitutionally different when caused by a retroactive effective date.²⁹ In *Turner Elkhorn*, for example, the employer could no more undo the earlier decisions that later subjected it to unanticipated black lung liability than could Gray reverse its decision to withdraw from the Plan, which subjected it to withdrawal liability.³⁰ Just as this Court sustained *Turner Elkhorn's* retroactive liability in the context of a statute "adjusting the burdens and benefits of economic life," 428 U.S. at 15, so should it uphold Congress' decision to impose retroactive withdrawal liability.

Retroactive application was in fact necessary in the Multiemployer Act "to prevent employers from withdrawing in droves from multiemployer plans once they antici-

enacted); *United States v. Perry*, 431 F.2d 1020 (9th Cir. 1970) (1960 amendment to Anti-Kickback Act held applicable to kickback made ten years earlier).

²⁹ Contrary to the implication in Gray's Motion to Affirm (pp. 6-7), the constitutionality of this kind of retroactivity is not limited to statutes that may be characterized as "tax laws." The same reasoning as governs "tax laws" is applicable, as well, to any form of economic regulation, particularly one in which liability is imposed to insure that the reasonable contractual expectations of a large segment of society—such as the employers that continue to contribute to multiemployer plans and the participants in those plans—are realized. Indeed, the Court of Claims in *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct. Cl.), cert. denied, 398 U.S. 950 (1970), emphasized that the Interest Equalization Tax Act was principally a *regulatory* enactment rather than a revenue-producing law, and concluded that the Act's regulatory purpose strengthened the case for its retroactive application. *Id.* at 729-30.

³⁰ Indeed, the expectations of *Turner Elkhorn Mining Co.* were even more "settled" than were the expectations of Gray. See *supra* pp. 3-13; *infra* pp. 35-40. Moreover, Congress was sensitive to the settled expectations of employers who, unlike Gray, had committed themselves to withdrawal before the introduction of the Multiemployer Act. See *supra* p. 12. Congress also provided a means for reducing or eliminating the retroactive impact of withdrawal liability. See 29 U.S.C. § 1387 (Supp. V 1981).

pated passage of [the Multiemployer Act]." *Coronet Dodge, Inc. v. Speckmann*, 553 F. Supp. at 521. Indeed, the court of appeals did not disagree with the need to deter employer withdrawals. It chose, however, to override Congress' determination as to how to achieve such deterrence and relied, instead, on its own appraisal of "[o]ther legislative programs" (J.S. 25a). Those other programs, however, would have been inadequate. The existence of contingent liability, as provided in ERISA, was not an effective deterrent.³¹ Nor, apparently, was the court below aware that plans which do not terminate can still be harmed by employer withdrawals. See 29 U.S.C. § 1001a(a)(4)(A) (Supp. V 1981). Congress also specifically found that employer withdrawals not only affect participants and employers who continue to contribute, but also labor-management relations. *Id.*³² The Ninth's Circuit determination to consider legislative alternatives led it to uninformed judgments on the effect of legislation that Congress had carefully studied and exhaustively reviewed. See also *supra* note 19.

³¹ Collective bargaining, specifically in the construction industry right now, is in chaos because of that 30-percent contingent liability aspect. We have employers who are saying to themselves and their colleagues, let us get . . . out from under these collective bargaining agreements now. We will take a calculated risk, they will not fold in 5 years and we will be home free.

House Labor Hearings, *supra* note 4, at 380 (Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans, and President, Building Trades Department of the AFL-CIO) (emphasis added).

³² For instance, conflict between withdrawing and remaining employers and the uncertainty over the impact of withdrawals on pension expectations contributed to the lengthy coal miners' strike in 1978. 126 Cong. Rec. H3952 (daily ed. May 21, 1980) (Rep. Perkins); *id.* at S10105 (daily ed. July 29, 1980) (Sen. Randolph).

**B. Congress Properly Held Employers Responsible
For Knowledge That The Multiemployer Act Would
Be Approved**

The central issue in this case is whether Congress may rationally act to discourage last-minute efforts to nullify the economic impact of legislation that is on the verge of enactment by announcing that a pending bill, if enacted into law, will take effect as of a date during the final stages of Congress' deliberation, and then incorporating that date into law. The issue is further narrowed by two special circumstances surrounding the imposition of a retroactive effective date: (1) such a provision had been a consistent feature of this legislation during the two years of its consideration, and (2) the date finally enacted into law was advanced by some 14 months, thereby coinciding with major congressional committee action. On these facts, it is plainly unsound to say, as the court below did, that for constitutional purposes, employers "relied reasonably upon their collective bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA" (J.S. 19a).

Other courts have strongly disagreed with the conclusion of the court below. One federal judge has said that during the five-month period between April 29, 1980, and the date on which the Multiemployer Act became law "there was strong evidence to suggest that [the Multiemployer Act] was likely to pass and that it would be retrospective when it did." *Peick v. PBGC*, 539 F. Supp. at 1053. Noting that it was "hardly credible" that an employer had no actual notice of such retroactivity, another court said that "[an employer's] ignorance must have resulted from a culpable failure to acquaint itself with information publicly available." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. at 409 n.8.³³

³³ The general news media, for instance, not only followed the legislative progress of the Multiemployer Act, *see, e.g.*, The New

When a new provision of law is so substantially anticipated on the public record, the law may constitutionally have a retroactive application to the period when it is under legislative consideration. This Court so held in *Darusmont*, which concerned a completed financial transaction whose tax consequences were altered by subsequent legislation. In rejecting the taxpayer's assertion of reliance on prior law, this Court said that the taxpayer was

hardly in a position to claim surprise at the 1976 amendments to the minimum tax. The proposed increase in rate had been under public discussion for almost a year before its enactment. The Tax Reform Act of 1976 reflected a compromise between the House and Senate proposals. Both bills, however, provided that the changes in the minimum tax were to be effective for taxable years beginning after 1975. Appellee, therefore, had ample advance notice of the increase in the effective minimum rate.

449 U.S. at 299 (citations omitted).³⁴

This Court's ruling in *Darusmont* surely applies to Gray, which received repeated statutory warnings that it might not escape responsibility for financing the Pension Plan's benefit promises. Since September 2, 1974, when

York Times, Mar. 26, 1980, at 18 (App. 3a-5a), but also reported that it would operate retroactively, *see, e.g.*, The Wall Street Journal, Mar. 28, 1980, at 7 (App. 6a); Associated Press, Washington Briefs, Apr. 29, 1980 (App. 7a).

³⁴ By the same rationale, the Court of Claims upheld the retroactivity of the 1964 Interest Equalization Tax Act in *First National Bank in Dallas v. United States*, 420 F.2d at 730 (footnote omitted). The court said:

[I]t is our view that where there is reasonable cause to believe or expect that a tax will be imposed upon a presently nontaxable transaction, the retrospective application of such tax does not constitute a denial of due process.

ERISA created contingent termination liability, Gray was on notice that its contractual disclaimers of liability for Plan *benefits* had been statutorily displaced, and that in the event of the Plan's termination it could be held responsible for additional financing of the Plan's obligations. From the date of ERISA's passage, employers like Gray should have anticipated that they could not withdraw scot-free from multiemployer plans, leaving the funding of their share of vested benefits to other employers. Even the congressional opponents of withdrawal liability conceded that ERISA had fundamentally altered employers' obligations to multiemployer plans by "making employers liable for plan benefits rather than just their negotiated contributions." H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 222, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2988 (separate views).

Indeed, the very Trust Agreement to which Gray was a party appeared to recognize that changes in the law would alter its financial obligations. Article II, Section 6 provides:

The liability of any Individual Employer to the Fund, or with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement or Trust Agreement The Individual Employers shall not be required to make any further contributions to the cost of operation of the Fund or of the Plan, except as herein elsewhere provided. *This section shall only apply to the extent permitted by law.*

(J.A. 117-18; emphasis added). Article II, Section 7 of the Trust Agreement contains a similar clause: "*To the extent permitted by law,*" no employer or signatory association "shall be liable or responsible for any debts, liabilities or obligations of the Fund or of the Trustees" (J.A. 118; emphasis added). And Section 10.03 of the Plan provides, in pertinent part, as follows (J.A. 97; emphasis added):

This pension plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the plan on a permanent basis, fulfilling the funding requirements of ERISA. *Except for liabilities which result from provisions of ERISA*, nothing contained in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement with the Union. . . .

The enactment of ERISA was only the first of several legislative events that warned Gray that it might be subject to obligations to the Plan beyond its bargained contributions. Since December 19, 1977, when Congress extended the mandatory coverage deadline and instructed the PBGC to propose alternatives to the existing program, Gray had notice that Congress was dissatisfied with the multiemployer plan termination insurance program and that the PBGC had been made responsible for proposing alternative approaches to the original statutory framework. 91 Stat. 1501 (1977). After July 1, 1979, when Congress again extended the mandatory coverage deadline (93 Stat. 70), Gray had notice that the PBGC's proposals were being given serious scrutiny by Congress.³⁵ And, after May 1, 1980, when Congress extended the deadline for only two months (94 Stat. 341), Gray had

³⁵ See 125 Cong. Rec. H4004-05 (daily ed. June 4, 1979) (Rep. Erlenborn); *id.* at S7014 (daily ed. June 6, 1979) (Sen. Javits). The PBGC guide to its recommendations to Congress, H.R. Rep. No. 215, 96th Cong., 1st Sess. 8-9, reprinted in 1979 U.S. Code Cong. & Ad. News 297, states:

Problem 6: The current rules governing an employer's withdrawal from a plan fail to protect participants, remaining employers and the PBGC from the costs of voluntary employer withdrawals. . . .

The remedy: Require employers who leave a plan to continue to make periodic payments to fund their liabilities.

notice that Congress was on the verge of enacting a bill. By that date two committees in the House of Representatives and one in the Senate had approved bills providing for withdrawal liability retroactive to February 27, 1979. In connection with the two-month extension of the mandatory coverage deadline, a member of a fourth committee had announced that the bill reported by it would also provide for retroactive withdrawal liability. Under these circumstances, Gray's directors, "as prudent businessmen, surely could be expected to know, and can properly be charged with knowing, that ERISA was likely to be amended and that withdrawal liability under the [Multiemployer Act] would probably be imposed retroactively." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. at 409.³⁶

Finally, Congress advanced the effective date by 14 months to ensure fairness.³⁷ Having been on notice of the

³⁶ The Associated General Contractors of America, the employer association that negotiated the Carpenters Master Labor Agreement adopted by Gray, *see supra* p. 14, participated extensively in the legislative process that produced the Multiemployer Act. The AGC's statements before the Congress are found at *House Labor Hearings*, *supra* note 4, at 449, 941 (June 7, 1979); *Senate Labor Hearings*, *supra* note 10, at 639, 643 (June 27, 1979); *1979 House Ways and Means Hearing*, *supra* note 12, at 124 (July 25, 1979); *1980 House Ways and Means Hearing*, *supra* note 12, at 122 (Feb. 19, 1980); and *Senate Finance Hearing*, *supra* note 10, at 206, 208 (Mar. 18, 1980). Congress heeded construction employers' admonitions that their industry required special treatment by the Multiemployer Act, and the Act "recognizes and makes provision for the unique characteristics and requirements of the construction industry represented by the NCEC." *Id.* at 165 (Mar. 18, 1980) (supplement to the testimony of the National Construction Employers Council). Withdrawal liability is assessed only against a construction employer that, as Gray has done, ceases contributing to a plan and continues construction work in competition with remaining employers. *See* 29 U.S.C. § 1883(b)(2)(B) (Supp. V 1981).

³⁷ In addition to shortening the retroactivity period, Congress took other action to reduce the effect of the statute's retroactive

earlier date, Gray—which withdrew from its plan after the Multiemployer Act had been approved by the full House of Representatives and by the Senate Committee on Education and Labor—could hardly complain of the April 29, 1980 date.

application. Section 4217 of ERISA, 29 U.S.C. § 1397 (Supp. V 1981), provides that where, prior to the statute's effective date, an employer closed one or more facilities or terminated one or more collective bargaining agreements with respect to which it was making contributions to a plan, contributions and contribution base units relating to such facilities or agreements will not be taken into account in computing an employer's withdrawal liability or in determining whether a partial withdrawal has occurred. One effect of Section 4217 is to reduce an employer's liability in the event of a withdrawal by approximately the percentage of its contributions that ceased prior to the effective date. In addition, the statute's general moderating provisions may also mitigate liability for pre-enactment withdrawals. 29 U.S.C. §§ 1383(b), (c), (d), (f), 1384, 1387, 1388, 1389, 1398, 1399(c)(1), 1404, and 1405 (Supp. V 1981). See also *Peick v. PBGC*, 539 F. Supp. at 1050-51.

CONCLUSION

Congress has determined that disappointment of participant expectations in the area of pension benefits is a national problem. The Multiemployer Act's insolvency insurance program for multiemployer plans is a crucial aspect of the legislative response to this problem. The brief period of retroactive withdrawal liability, which was essential to the fulfillment of the Multiemployer Act's purposes, meets all constitutional tests. The judgment of the court of appeals declaring the Multiemployer Act unconstitutional should be reversed.

Respectfully submitted,

HENRY ROSE

General Counsel

MITCHELL L. STRICKLER

Deputy General Counsel

BARUCH A. FELLNER

Associate General Counsel

J. STEPHEN CAFLISCH

Special Counsel

PETER H. GOULD

TERENCE G. CRAIG

DAVID F. POWER

DEBRA N. DIENER

Attorneys

Of Counsel:

NATHAN LEWIN

SETH P. WAXMAN

MILLER, CASSIDY,

LARROCA & LEWIN

2555 M Street, N.W.

Suite 500

Washington, D.C. 20037

(202) 293-6400

**PENSION BENEFIT GUARANTY
CORPORATION**

2020 K Street, N.W.

Washington, D.C. 20006

(202) 254-4864

December 12, 1983

APPENDIX

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* The statutory provisions reproduced herein are derived from ERISA as originally enacted and codified at title 29 United States Code (1976) and from ERISA as amended by the Multiemployer Act and codified at title 29 United States Code (Supp. V 1981). Thus an amended provision appearing in Part H will, where relevant to the brief, appear in Part G in its unamended form. Only those provisions cited in the PBGC brief and certain related provisions are reproduced.

APPENDIX

5 ELLIOT'S DEBATES 546 (2d ed. 1845)

. . . .

Mr. SHERMAN thought "from time to time," the best rule to be given. "Annually" was struck out, and those words inserted, *nem. con.*

The motion of Col. Mason, so amended, was then agreed to, *nem. con.*, and added after "appropriations by law," as follows:—

"and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The first clause of article 1, sect. 10, was altered so as to read,—

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

Mr. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

Adjourned.

. . . .

**PENSION BENEFIT GUARANTY CORPORATION
ANNUAL REPORT TO THE CONGRESS FY 82
PAGES 6-7**

. . . .

Trusted Single-Employer Plans

PBGC must become the trustee of terminated single-employer plans that do not have sufficient assets to pay guaranteed benefits. Under the Multiemployer Act, PBGC becomes trustee of multiemployer plans only in unusual circumstances. During FY 82, PBGC became trustee for 120 terminated single-employer pension plans having 34,000 participants. At fiscal year end, another 134 pension plans were being processed by PBGC in anticipation of its becoming trustee (See Table II). In the latter cases, PBGC assures that participants continue to receive their guaranteed benefits while the necessary arrangements are made to take over their plans.

After eight years of operation, PBGC is trustee for 780 pension plans and directly responsible for paying PBGC guaranteed pensions to about 106,000 people entitled to immediate or deferred benefits under terminated plans.

. . . .

**THE NEW YORK TIMES,
WEDNESDAY, MARCH 26, 1980, PAGE A18**

**Congress Speeds Bill to Strengthen
Multi-Employer Pension Programs**

**Business and Labor Join in a Move to Shore Up Plans
That Guarantee Funds for Many Retired Workers**

**By PHILIP SHABECOFF
Special to the New York Times**

WASHINGTON, March 25—Backed by an unusual alliance of business and labor, legislation to shore up financially troubled multi-employer pension plans is now speeding through the legislative process on Capitol Hill.

Critics of the legislation say it could result in sharply reduced retirement benefits for many of the workers covered by the affected pension plans.

But supporters say that without the provisions of the proposed bill, many of these pension plans would collapse or otherwise be terminated by employers who would not or could not assume the financial liability of guaranteeing the full pensions.

The bill, which was being drafted by the House Ways and Means Committee today after having been approved earlier by the Senate Labor Committee and the House Labor Committee, affects pension plans sponsored by more than one employer and covering more than one group of workers. The plans cover about 8 million workers in such industries as construction, textiles, mining and trucking. Typically, unions as well as employers are trustees of the plans.

. . . .

The Employee Retirement Income Security Act of 1974 required pension plans to insure themselves through a

new Government agency called the Pension Benefit Guaranty Corporation. The law required that 100 percent of all benefits payable to retired persons be guaranteed up to a total of \$1,159.09 a month, a ceiling high enough to cover most pensions.

But the rule applied only to single-employer pension plans. Multi-employer plans, which were considered at the time to be less risk-prone because of their makeup, were given different treatment. Participation in the Pension Benefit Guaranty Corporation was not mandatory at first, and premiums required were considerably lower than those for single-employer plans.

Since 1974, multi-employer plans for millinery and milk delivery workers collapsed, and serious problems developed in others. Business and labor representatives and members of Congress acknowledged that guarantees were needed for these plans, too. Accordingly, as of May 1, multi-employer plans are scheduled to be covered by the Pension Benefit Guaranty Corporation.

Many employers participating in the plans indicated, however, that the insurance premiums involved in guaranteeing the pensions would be high enough to make it preferable to end their participation. The trustees of sound plans said they should not have to pay for the insurance of plans that were in trouble. Others were worried that they would be left bearing the burden of liability of their plan as other employers dropped out.

Turning to Nonunion Labor

Unions, in addition to wanting a guarantee of pensions for their members, found that some employers were ending their collective bargaining agreements and turning to nonunion labor rather than staying in the expensive program.

To keep employers and unions in the pension plans, the pending legislation would do these things:

¶ Pension plans in trouble would be required to cut benefits to reduce potential liability. Benefits could be cut at first to the levels in effect five years earlier; if employer contributions are still not sufficient, the benefits could be cut back still further.

¶ Employers who do withdraw from a multi-employer plan generally must continue to contribute their share until they have paid off the pensions promised in the plan.

The insurance premiums for the plans would be raised from an originally contemplated 50 cents a year for each worker or retired worker to \$2.60 a year for nine years under the House version of the bill, and a scale rising to \$3.40 a worker in the Senate version.

'Delicate Balance' vs. 'Giveaway'

Supporters of the bill describe it as a "delicate balance" among competing interests that creates incentives for both employers and unions to continue to participate in the pension plans, and disincentives for terminating plans.

But Karen W. Ferguson, director of the Pension Rights Center, calls the bill "a great Government giveaway" because it could substantially reduce pension benefits expected by retired persons without their having any say in the matter.

Senator Jacob K. Javits, Republican of New York, argued that while it may be necessary to cut guarantees of benefits somewhat to insure the viability of the plans, it would be better to cut them less and raise employers' premiums more.

Several unions, including the United Steel Workers and the United Automobile Workers, are staying neutral on the pending pension legislation. A steelworker official expressed concern that a law reducing benefit guarantees for multi-employer pension plans would be seized upon by single-employer plans as a precedent. Steelworkers are generally covered by single-employer plans.

**THE WALL STREET JOURNAL,
FRIDAY, MARCH 28, 1980, PAGE 7**

**Ways-Means Panel
Votes Its Version
Of Pension Plan Bill**

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—The House Ways and Means Committee approved a bill aimed at strengthening multiemployer pension plans.

As passed by the Ways and Means panel, the bill contains few important changes from the version approved earlier this year by the House Committee on Education and Labor. But the Ways and Means Committee agreed to an easier rule for determining the liability of employers who withdraw from multiemployer plans.

Under the Education and Labor panel's bill, an employer would be liable for part of the plan's unfunded benefit obligations if he withdrew from the plan after Feb. 27, 1979. Under the Ways and Means Committee's bill, he wouldn't be liable if he announced his withdrawal before May 3, 1979, withdrew within 90 days of the announcement and can show that his previous contributions are enough to cover vested benefits.

The full House will have to choose between the bills. A similar measure is working its way through the Senate.

Multiemployer plans usually involve a number of companies that bargain with a single union. Single-employer plans cover only one company.

7a

**AP WIRE, APRIL 29, 1980
(REPRODUCED FROM LEXIS)**

The Associated Press

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April 29, 1980, Tuesday, AM cycle

SECTION: Washington Dateline

LENGTH: 150 words

DATELINE: WASHINGTON

KEYWORD: Washington Briefs

BODY:

The Senate Finance Committee voted Tuesday to delay until July 1 the start of mandatory insurance of pension plans covering employees of more than one company.

The Associated Press, April 29, 1980

Under a 1974 law, the federal Pension Benefit Guarantee Corp. is required to insure multi-employer plans starting on May 1. The Finance Committee wants the delay so Congress can complete action on bills that would change the guarantee program.

The House already has voted to delay mandatory coverage of multi-employer plans until June 1.

The Finance Committee agreed that any changes in the guarantee provisions would be made retroactive to Tuesday.

The guarantee program was created in an effort to protect the retirement pensions of workers who move from one company to another and those whose employers go out of business. The mandatory insurance provisions already apply to single-employer plans.

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

Legislative Changes Needed To
Financially Strengthen Single Employer
Pension Plan Insurance Program

The federal insurance program for single employer (sponsor) pension plans administered by the Pension Benefit Guaranty Corporation was created by the Employee Retirement Income Security Act of 1974. At the end of fiscal year 1982, the program reported a \$333 million deficit because claims from terminating plans accumulated faster than they could be financed from premiums. The Corporation estimates that unless premiums are increased this deficit could increase to an estimated \$938 million by fiscal year 1987.

Claims result primarily from bankrupt sponsors who are unable to continue funding pension plans. However, other circumstances also contribute to the increasing deficit: (1) full insurance coverage is generally provided for benefits granted retroactively for past service that have received limited sponsor funding; (2) minimum plan contributions by sponsors are deferred with Internal Revenue Service approval and remain unpaid upon plan termination; and (3) authority to recover unfunded pension liability for plans from sponsors is limited.

This report contains recommendations to the Congress to financially strengthen the program.

GAO/HRD-84-5
NOVEMBER 14, 1983

PBGC AUTHORITY LIMITED IN RECOVERING
UNFUNDED LIABILITY FROM
TERMINATING PLAN SPONSORS

ERISA employer liability provisions limit PBGC recovery of unfunded pension obligations from sponsors terminating pension plans. During the first 7 years of operation, the insurance program incurred \$397 million in claims for underfunded plans, of which it expected to recover an estimated \$60 million of employer liability. Pension obligations not recovered from sponsors of terminating plans are funded from premiums paid to the program by ongoing plans.

When a plan terminates, the plan's sponsor is obligated by ERISA to finance any deficiency in plan assets needed to meet the insurance program's guarantee levels up to a limit equal to 30 percent of the sponsor's net worth—the difference between the value of business assets and liabilities accumulated at a point in time. Such liability provisions were expected to deter solvent sponsors from terminating underfunded plans and produce a reasonable, although limited, recovery of liability from insolvent sponsors. These objectives are not being met because most sponsors do not have a positive net worth or their net worth is low in relation to the level of unfunded guaranteed benefits in terminated plans.

Our review of 38 pension plan terminations by 25 sponsors (which included 8 ongoing and 17 in bankruptcy or business liquidation) showed that PBGC's recovery from the terminating plans' sponsors was limited because:

- Thirty percent of their net worth was not sufficient to pay the unfunded pension plan liability for seven sponsors that continued in business after terminating plans.

- Contingent liabilities were not established against six companies that divested portions of their businesses, including underfunded pension plans terminated later by insolvent sponsors.
- Six insolvent sponsor's assets were distributed to unsecured creditors, but PBGC recovered little or none of its claim, which was limited by the sponsor's net worth.

[43] LIMITATIONS ON RECOVERY OF EMPLOYER LIABILITY FROM ONGOING SPONSORS

The insurance program is absorbing large plan insufficiencies when ongoing plan sponsors voluntarily terminate insufficient plans. PBGC absorbs the pension liabilities of these plans without significant recovery of employer liability when the sponsor terminates a deficient plan at a time when business net worth is low and PBGC has little or no financial basis under ERISA to recover employer liability.

Almost one-third of terminated pension plans trustee or expected to be trustee by the insurance program as of September 30, 1981, were sponsored by employers who continued in business while avoiding about \$17 million in liabilities for plan asset insufficiencies (see table 3, p. 11). While this sponsor group has the highest employer liability collection rate, it is questionable whether the program should act as a financial relief mechanism for solvent sponsors to avoid the consequence of pension plan underfunding.

The Congress and authorities in the pension community have raised concerns that other ongoing businesses in financial distress seeking relief from pension liabilities they have created could take advantage of ERISA provisions and terminate pension plans when company net worth is low. PBGC has identified 34 major firms with large unfunded pension liabilities that are under financial

pressure. Should these companies terminate their plans, PBGC estimates they could generate claims of about \$4.4 billion against the insurance program.

Eight of the sponsors in our review terminated pension plans and were still in business in 1982. About \$12.8 million of plan asset insufficiencies totaling \$26.3 million was expected to be collected from seven sponsors (PBGC's evaluation of one sponsor's net worth was not completed at the time of our review). The following examples illustrate ways in which ERISA's 30-percent net worth limitation prevented PBGC from recovering additional unfunded liabilities.

—A sporting goods manufacturer experienced net losses of \$2.8 million and \$4 million in 1976 and 1977, respectively. Citing adverse financial conditions, the company terminated two pension plans in December 1977. The plans were insufficient by about \$1.8 million. Because the company's net worth was \$200,000 at the time it terminated the plans, PBGC expected to collect only \$60,000 in employer liability. An August 1982 Dun & Bradstreet, Inc., report showed that, despite the depressed economy, the company's sales increased and an operating profit of [44] \$145,000 after taxes was realized in 1980. Hence, this employer's net worth did not prove to be an adequate gauge of its ability to meet pension obligations.

—A mattress manufacturer adopted a pension plan for its hourly employees in 1950 and one for its salaried employees in 1960. The company, after suffering losses of about \$3.9 million during fiscal years 1973-76 and reporting a net worth of \$50,000 as of March 1976, terminated its salaried plan in 1976 and its hourly plan in 1978. The 1976 termination resulted in a claim of \$596,941 on the insurance program and a collection of \$15,000 in employer liability. The 1978 termination resulted

in a claim of \$512,432, and PBGC expects that employer liability will be low. A September 1982 Dun & Bradstreet report showed the company continuing in business with estimated annual sales of about \$8 million compared to about \$4.4 million in 1978. Despite its financial distress, the company established a successor plan for its hourly employees which provided defined benefits covered by PBGC's insurance program, including past service benefits for the same employees extending back to the years covered by the terminated insufficient plan.

When an ongoing sponsor terminates its plan(s), there are other negative implications for the insurance program and for plan participants. Plan participants must accept guaranteed benefit levels that are often reduced by ERISA benefit ceilings in lieu of the plan's higher benefit levels. The added requirements for benefit payment administration associated with participants in the plans that ongoing sponsors terminate increase insurance program costs paid by all plans.

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STATUTORY PROVISIONS

29 U.S.C. (1976)

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as effecting [sic] interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inade-

quacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1082. Minimum funding standards**Avoidance of accumulated funding deficiency**

(a) (1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 1085 of this title) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

Funding standard account

(b) (1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of—

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized)—

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability

under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(v) separately, with respect to each plan year, the net loss (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years,

. . . .

§ 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

§ 1322. Benefits guaranteed

(a) Nonforfeitable benefits

Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it.

(b) Exceptions

(1) Except to the extent provided in paragraph (8)—

(A) no benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates shall be guaranteed under this section, and

(B) any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.

(2) For purposes of this subsection, the time a successor plan (within the meaning of section 1321(a) of

this title) has been in effect includes the time a previously established plan (within the meaning of section 1321(a) of this title) was in effect. For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60 month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.

(3) The amount of monthly benefits described in subsection (a) of this section provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) \$750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 430 of Title 42) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

The provisions of this paragraph do not apply to non-basic benefits.

(4) (A) The actuarial value of a benefit, for purposes of this subsection, shall be determined in accordance with regulations prescribed by the corporation.

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(8) Benefits described in paragraph (1) are guaranteed only to the extent of the greater of—

(A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or

(B) \$20 per month, multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect. In determining how many years a plan or amendment has been in effect for purposes of this paragraph, the first 12 months following the date on which the plan or amendment is made or first becomes effective (whichever is later) constitutes one year, and each consecutive period of 12 months thereafter constitutes an additional year. This paragraph does not apply to benefits payable under a plan unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter.

* * * *

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. Amounts guaranteed by the corporation under section 1322 of this title shall be paid by the corporation out of the appropriate fund.

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

(b) Amount of liability

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

§ 1364. Liability of employers on termination of plan maintained by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who,

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at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 of this title except that the amount of the liability determined under section 1362(b)(1) of this title with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction—

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 1362(b)(2) of this title shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

§ 1381. Effective date; special rules

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan—

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later

than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

* * * *

(c) (1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before January 1, 1978. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the Committee on Labor and Public Welfare and the Committee on Finance of the Senate.

(2) the corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before January 1, 1978, if—

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after December 31, 1977.

29 U.S.C. (SUPP. V 1981)

§ 1001a. Additional Congressional findings and declaration of policy**(a) The Congress finds that—**

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4) (A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that—

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such

plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) It is hereby declared to be the policy of this Act—

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multi-employer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multi-employer plans.

§ 1082. Minimum funding standards

. . . .

(b) Funding standard account

(1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of—

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized)—

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years,

(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,

(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 15 plan years, and

* * * *

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

(1) “administrator” means the person or persons described in paragraph (16) of section 1002 of this title;

(2) “substantial employer” means for any plan year an employer (treating employers who are members of the same affiliated group, within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(a)(4) and (e)(3)(C) of Title 26, as one employer) who has made contributions to or under a plan under which more than one employer (other than a multiemployer plan) makes contributions for each of—

(A) the two immediately preceding plan years, or

(B) the second and third preceding plan years,

equaling or exceeding 10 percent of all employer contributions paid to or under that plan for each such year;

(3) "multiemployer plan" means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

except that, in applying this paragraph—

(i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and

(ii) for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in section 414(f) of Title 26 as in effect immediately before such date;

.

(6) "basic benefits" means benefits guaranteed under section 1322 of this title (other than under section 1322(c) of this title), or under section 1322a of this title (other than under section 1322a(g) of this title);

(7) "non-basic benefits" means benefits guaranteed under section 1322(c) of this title or 1322a(g) of this title;

(8) "nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satis-

fied the conditions for entitlement under the plan or the requirements of this chapter (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this chapter or Title 26;

(9) "reorganization index" means the amount determined under section 1421(b) of this title;

(10) "plan sponsor" means, with respect to a multiemployer plan—

(A) the plan's joint board of trustees, or

(B) if the plan has joint board of trustees, the plan administrator;

(11) "contribution base unit" means a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury; and

(12) "outstanding claim for withdrawal liability" means a plan's claim for the unpaid balance of the liability determined under part 1 of subtitle E of this subchapter for which demand has been made, valued in accordance with regulations prescribed by the corporation.

(b) (1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c) (1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not in-

corporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

(2) For purposes of this subchapter, "single-employer plan" means, except as otherwise specifically provided in this subchapter, any plan which is not a multiemployer plan.

. . . .

§ 1306. Premium rates

(a) Schedules for premium rates and bases for application; establishment, coverage, etc.

(1) The corporation shall prescribe such schedules of premium rates and bases for the application of those rates as may be necessary to provide sufficient revenue to the fund for the corporation to carry out its functions under this subchapter. The premium rates charged by the corporation for any period shall be uniform for all plans, other than multiemployer plans, insured by the corporation with respect to basic benefits guaranteed by it under section 1322 of this title, and shall be uniform for all multiemployer plans with respect to basic benefits guaranteed by it under section 1322a of this title. In establishing annual premiums with respect to plans, other than multiemployer plans, paragraphs (5) and (6) of this subsection (as in effect before September 26, 1980) shall continue to apply.

(2) The corporation shall maintain separate schedules of premium rates, and bases for the application of those rates, for—

(A) basic benefits guaranteed by it under section 1322 of this title for single-employer plans,

(B) basic benefits guaranteed by it under section 1322a of this title for multiemployer plans,

(C) nonbasic benefits guaranteed by it under section 1322 of this title for single-employer plans,

(D) nonbasic benefits guaranteed by it under section 1322a of this title for multiemployer plans, and

(E) reimbursements of uncollectible withdrawal liability under section 1402 of this title.

* * * *

(3) (A) Except as provided in subparagraph (C), the annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this subchapter is—

(i) in the case of a single-employer plan, for plan years beginning after December 31, 1977, an amount equal to \$2.60 for each individual who is a participant in such plan during the plan year;

(ii) in the case of a multiemployer plan, for the plan year within which the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 falls, an amount for each individual who is a participant in such plan for such plan year equal to the sum of—

(I) 50 cents, multiplied by a fraction the numerator of which is the number of months in such year ending on or before such date and the denominator of which is 12, and

(II) \$1.00, multiplied by a fraction equal to 1 minus the fraction determined under clause (i).

(iii) in the case of a multiemployer plan, for plan years beginning after September 26, 1980, an amount equal to—

(I) \$1.40 for each participant, for the first, second, third, and fourth plan years,

(II) \$1.80 for each participant, for the fifth and sixth plan years.

(III) \$2.20 for each participant, for the seventh and eighth plan years, and

(IV) \$2.60 for each participant, for the ninth plan year, and for each succeeding plan year.

* * * *

(5) (A) In carrying out its authority under paragraph (1) to establish schedules of premium rates, and bases for the application of those rates, for nonbasic benefits guaranteed under sections 1322 and 1322a of this title the premium rates charged by the corporation for any period for nonbasic benefits guaranteed shall—

(i) be uniform by category of nonbasic benefits guaranteed,

(ii) be based on the risks insured in each category, and

(iii) reflect the experience of the corporation (including experience which may be reasonably anticipated) in guaranteeing such benefits.

* * * *

§ 1322a. Multiemployer plan benefits guaranteed

(a) Benefits of covered plans subject to guarantee

The corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a multiemployer plan—

(1) to which section 1321 of this title applies, and

(2) which is insolvent under section 1426(b) or 1441(d) (2) of this title.

(b) Benefits or benefit increases not eligible for guarantee

(1) (A) For purposes of this section, a benefit or benefit increase which has been in effect under a plan for less than 60 months is not eligible for the corporation's guarantee. For purposes of this paragraph, any month of any plan year during which the plan was insolvent or terminated (within the meaning of section 1341a(a)(2) of this title) shall not be taken into account.

(B) For purposes of this section, a benefit or benefit increase which has been in effect under a plan for less than 60 months before the first day of the plan year for which an amendment reducing the benefit or the benefit increase is taken into account under section 1425(a)(2) of this title in determining the minimum contribution requirement for the plan year under section 1423(b) of this title is not eligible for the corporation's guarantee.

* * *

(c) Determinations respecting amount of guarantee

(1) Except as provided in subsection (g) of this section, the monthly benefit of a participant or a beneficiary which is guaranteed under this section by the corporation with respect to a plan is the product of—

(A) 100 percent of the accrual rate up to \$5, plus 75 percent of the lesser of—

(i) \$15, or

(ii) the accrual rate, if any, in excess of \$5, and

(B) the number of the participant's years of credited service.

(2) Except, as provided in paragraph (6) of this subsection and in subsection (g) of this section, in applying paragraph (1) with respect to a plan described in para-

graph (5) (A), the term "65 percent" shall be substituted in paragraph (1) (A) for the term "75 percent".

. . . .

§ 1322b. Aggregate limit on benefits guaranteed; criteria applicable

(a) Notwithstanding sections 1322 and 1322a of this title, no person shall receive from the corporation pursuant to a guarantee by the corporation of basic benefits with respect to a participant under all multiemployer and single employer plans an amount, or amounts, with an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the amount determined under section 1322(b) (3) (B) of this title as of the date of the last plan termination.

(b) For purposes of this section—

(1) the receipt of benefits under a multiemployer plan receiving financial assistance from the corporation shall be considered the receipt of amounts from the corporation pursuant to a guarantee by the corporation of basic benefits except to the extent provided in regulations prescribed by the corporation, and

(2) the date on which a multiemployer plan, whether or not terminated, begins receiving financial assistance from the corporation shall be considered a date of plan termination.

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a single-employer plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. The corporation shall provide financial assistance to pay benefits under a multiemployer plan which is

insolvent under section 1426 or 1441(d)(2)(A) of this title, subject to the limitations and requirements of subtitles B, C, and E of this subchapter. Amounts guaranteed by the corporation under sections 1322 and 1322a of this title shall be paid by the corporation only out of the appropriate fund. The corporation shall make payments under the supplemental program to reimburse multiemployer plans for uncollectible withdrawal liability only out of the fund established under section 1305(e) of this title.

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a single-employer plan at the time it was terminated, but does not apply—

. . . .

§ 1364. Liability of employers on termination of plan maintained by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions (other than a multiemployer plan) at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

. . . .

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term “complete withdrawal” means a complete withdrawal described in section 1383 of this title.

(3) The term “partial withdrawal” means a partial withdrawal described in section 1385 of this title.

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

- (1) permanently ceases to have an obligation to contribute under the plan, or
- (2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B) (ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B) (i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan, a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if—

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either—

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issue by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3) (B) (ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For the purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

§ 1384. Sale of assets

(a) Complete or partial withdrawal not occurring as a result of sale and subsequent cessation of covered operations or cessation of obligation to contribute to covered operations; continuation of liability of seller

(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the "seller") under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party (hereinafter in this section referred to as the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if—

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of—

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser—

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due,

then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3) (A) If all, or substantially all, of the seller's assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1) (C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

(B) If only a portion of the seller's assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

(b) Liability of purchaser

(1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

(2) If the plan is in reorganization in the plan year in which the sale of assets occurs, the purchaser shall furnish a bond or escrow in an amount equal to 200 percent of the amount described in subsection (a) (1) (B) of this section.

(c) Variances or exemptions from continuation of liability of seller; procedures applicable

The corporation may by regulation vary the standards in subparagraphs (B) and (C) of subsection (a)(1) of this section if the variance would more effectively or equitably carry out the purposes of this subchapter. Before it promulgates such regulations, the corporation may grant individual or class variances or exemptions from the requirements of such subparagraphs if the particular case warrants it. Before granting such an individual or class variance or exemption, the corporation—

- (1) shall publish notice in the Federal Register of the pendency of the variance or exemption,
- (2) shall require that adequate notice be given to interested persons, and
- (3) shall afford interested persons an opportunity to present their views.

(d) Definition

For purposes of this section, the term “unrelated party” means a purchaser or seller who does not bear a relationship to the seller or purchaser, as the case may be, that is described in section 267(b) of title 26, or that is described in regulations prescribed by the corporation applying principles similar to the principles of such section.

§ 1385. Partial withdrawals

(a) Determinative factors

Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year—

- (1) there is a 70-percent contribution decline, or
- (2) there is a partial cessation of the employer's contribution obligation.

(b) Criteria applicable

For purposes of subsection (a) of this section—

(1) (A) There is a 70-percent contribution decline for any plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year.

(B) For purposes of subparagraph (A)—

(i) The term "3-year testing period" means the period consisting of the plan year and the immediately preceding 2 plan years.

(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

(2) (A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to

perform work at the facility of the type for which the obligation to contribute ceased.

(B) For purposes of subparagraph (A), a cessation of obligations under a collective bargaining agreement shall not be considered to have occurred solely because, with respect to the same plan, one agreement that requires contributions to the plan has been substituted for another agreement.

(c) Retail food industry

(1) In the case of a plan in which a majority of the covered employees are employed in the retail food industry, the plan may be amended to provide that this section shall be applied with respect to such plan—

(A) by substituting “35 percent” for “70 percent” in subsections (a) and (b) of this section, and

(B) by substituting “65 percent” for “30 percent” in subsection (b) of this section.

(2) Any amendment adopted under paragraph (1) shall provide rules for the equitable reduction of withdrawal liability in any case in which the number of the plan's contribution base units, in the 2 plan years following the plan year of withdrawal of the employer, is higher than such number immediately after the withdrawal.

(3) Section 1388 of this title shall not apply to a plan which has been amended under paragraph (1).

(d) Continuation of liability of employer for partial withdrawal under amended plan

In the case of a plan described in section 404(c) of title 26, or a continuation thereof, the plan may be amended to provide rules setting forth other conditions consistent with the purposes of this chapter under which an employer has liability for partial withdrawal.

§ 1386. Adjustment for partial withdrawal; determination of amount; reduction for partial withdrawal liability; procedures applicable

(a) The amount of an employer's liability for a partial withdrawal, before the application of sections 1399(c) (1) and 1405 of this title, is equal to the product of—

(1) the amount determined under section 1391 of this title, and adjusted under section 1389 of this title if appropriate, determined as if the employer had withdrawn from the plan in a complete withdrawal—

(A) on the date of the partial withdrawal,
or

(B) in the case of a partial withdrawal described in section 1385(a) (1) of this title (relating to 70-percent contribution decline), on the last day of the first plan year in the 3-year testing period,

multiplied by

(2) a fraction which is 1 minus a fraction—

(A) the numerator of which is the employer's contribution base units for the plan year following the plan year in which the partial withdrawal occurs, and

(B) the denominator of which is the average of the employer's contribution base units for—

(i) except as provided in clause (ii), the 5 plan years immediately preceding the plan year in which the partial withdrawal occurs, or

(ii) in the case of a partial withdrawal described in section 1385(a) (1) of this ti-

tle (relating to 70-percent contribution decline), the 5 plan years immediately preceding the beginning of the 3-year testing period.

(b) (1) In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

(2) The corporation shall prescribe such regulations as may be necessary to provide for proper adjustments in the reduction provided by paragraph (1) for—

(A) changes in unfunded vested benefits arising after the close of the prior year for which partial withdrawal liability was determined,

(B) changes in contribution base units occurring after the close of the prior year for which partial withdrawal liability was determined, and

(C) any other factors for which it determined adjustment to be appropriate,

so that the liability for any complete or partial withdrawal in any subsequent year (after the application of the reduction) properly reflects the employer's share of liability with respect to the plan.

§ 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute un-

der the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

§ 1388. Reduction of partial withdrawal liability

(a) Obligation of employer for payments for partial withdrawal for plan years beginning after the second consecutive plan year following the partial withdrawal year; criteria applicable; furnishing of bond in lieu of payment of partial withdrawal liability

(1) If, for any 2 consecutive plan years following the plan year in which an employer has partially withdrawn from a plan under section 1385(a)(1) of this title (referred to elsewhere in this section as the "partial withdrawal year"), the number of contribution base units with respect to which the employer has an obligation to contribute under the plan for each such year is not less than 90 percent of the total number of contribution base units with respect to which the employer had an obligation to contribute under the plan for the high base year (within the meaning of section 1385(b)(1)(B)(ii) of this title), then the employer shall have no obligation to make payments with respect to such partial withdrawal (other than delinquent payments) for plan years beginning after the second consecutive plan year following the partial withdrawal year.

(2) (A) For any plan year for which the number of contribution base units with respect to which an em-

ployer who has partially withdrawn under section 1385 (a) (1) of this title has an obligation to contribute under the plan equals or exceeds the number of units for the highest year determined under paragraph (1) without regard to "90 percent of", the employer may furnish (in lieu of payment of the partial withdrawal liability determined under section 1386 of this title) a bond to the plan in the amount determined by the plan sponsor (not exceeding 50 percent of the annual payment otherwise required).

(B) If the plan sponsor determines under paragraph (1) that the employer has no further liability to the plan for the partial withdrawal, then the bond shall be cancelled.

(C) If the plan sponsor determines under paragraph (1) that the employer continues to have liability to the plan for the partial withdrawal, then—

(i) the bond shall be paid to the plan,

(ii) the employer shall immediately be liable for the outstanding amount of liability due with respect to the plan year for which the bond was posted, and

(iii) the employer shall continue to make the partial withdrawal liability payments as they are due.

(b) **Obligation of employer for payments for partial withdrawal for plan years beginning after the second consecutive plan year; other criteria applicable**

If—

(1) for any 2 consecutive plan years following a partial withdrawal under section 1385(a) (1) of this title, the number of contribution base units with respect to which the employer has an obligation to contribute for each such year exceeds 30 percent of the total number of contribution base units with re-

spect to which the employer had an obligation to contribute for the high base year (within the meaning of section 1385(b) (1) (B) (ii) of this title,¹ and

(2) the total number of contribution base units with respect to which all employers under the plan have obligations to contribute in each of such 2 consecutive years is not less than 90 percent of the total number of contribution base units for which all employers had obligations to contribute in the partial withdrawal plan year;

then, the employer shall have no obligation to make payments with respect to such partial withdrawal (other than delinquent payments) for plan years beginning after the second such consecutive plan year.

(c) Pro rata reduction of amount of partial withdrawal liability payment of employer for plan year following partial withdrawal year

In any case in which, in any plan year following a partial withdrawal under section 1385(a) (1) of this title, the number of contribution base units with respect to which the employer has an obligation to contribute for such year equals or exceeds 110 percent (or such other percentage as the plan may provide by amendment and which is not prohibited under regulations prescribed by the corporation) of the number of contribution base units with respect to which the employer had an obligation to contribute in the partial withdrawal year, then the amount of the employer's partial withdrawal liability payment for such year shall be reduced pro rata, in accordance with regulations prescribed by the corporation.

¹ So in original. Probably should be "title).".

(d) Building and construction industry; entertainment industry

(1) An employer to whom section 1383(b) of this title (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

(2) An employer to whom section 1383(c) of this title (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by the corporation by regulation.

(e) Reduction or elimination of partial withdrawal liability under any conditions; criteria; procedures applicable

(1) The corporation may prescribe regulations providing for the reduction or elimination of partial withdrawal liability under any conditions with respect to which the corporation determines that reduction or elimination of partial withdrawal liability is consistent with the purposes of this chapter.

(2) Under such regulations, reduction of withdrawal liability shall be provided only with respect to subsequent changes in the employer's contributions for the same operations, or under the same collective bargaining agreement, that gave rise to the partial withdrawal, and changes in the employer's contribution base units with respect to other facilities or other collective bargaining agreements shall not be taken into account.

(3) The corporation shall prescribe by regulation a procedure by which a plan may by amendment adopt rules for the reduction or elimination of partial with-

drawal liability under any other conditions, subject to the approval of the corporation based on its determination that adoption of such rules by the plan is consistent with the purposes of this chapter.

§ 1389. De minimis rule

(a) Reductions of unfunded vested benefits allocable to employer withdrawn from plan

Except in the case of a plan amended under subsection (b) of this section, the amount of the unfunded vested benefits allocable under section 1391 of this title to an employer who withdraws from a plan shall be reduced by the smaller of—

(1) $\frac{3}{4}$ of 1 percent of the plan's unfunded vested obligations (determined as of the end of the plan year ending before the date of withdrawal), or

(2) \$50,000,

reduced by the amount, if any, by which the unfunded vested benefits allowable to the employer, determined without regard to this subsection, exceeds \$100,000.

(b) Amendment of plan for reduction of amount of unfunded vested benefits allocable to employer withdrawn from plan

A plan may be amended to provide for the reduction of the amount determined under section 1391 of this title by not more than the greater of—

(1) the amount determined under subsection (a) of this section, or

(2) the lesser of—

(A) the amount determined under subsection

(a) (1) of this section, or

(B) \$100,000,

reduced by the amount, if any, by which the amount determined under section 1391 of this title for the em-

ployer, determined without regard to this subsection, exceeds \$150,000.

(c) Nonapplicability

This section does not apply—

(1) to an employer who withdraws in a plan year in which substantially all employers withdraw from the plan, or

(2) in any case in which substantially all employers withdraw from the plan during a period of one or more plan years pursuant to an agreement or arrangement to withdraw, to an employer who withdraws pursuant to such agreement or arrangement.

(d) Presumption of employer withdrawal from plan pursuant to agreement or arrangement applicable in action or proceeding to determine or collect withdrawal liability

In any action or proceeding to determine or collect withdrawal liability, if substantially all employers have withdrawn from a plan within a period of 3 plan years, an employer who has withdrawn from such plan during such period shall be presumed to have withdrawn from the plan pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before April 29, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2) (A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after April 28, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before April 29, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before April 29, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4) (A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under title 11, or similar proceedings.²

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

² So in original. The period probably should be a comma.

- (c) **Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount**

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

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- (e) **Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer**

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

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§ 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

§ 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before April 29, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before April

29, 1980, or for which there was a permanent cessation of the obligation to contribute before that date, shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

§ 1398. Withdrawal not to occur because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

(1) an employer ceases to exist by reason of—

(A) a change in corporate structure described in section 1362(d) of this title, or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligations to contribute under the plan or,

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as

the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2) (A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1) (A) (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C) (i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a) (1) of this title shall

be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw

from a plan pursuant to an agreement or arrangement to withdraw from the plan—

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of—

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386 (a) (2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b) (1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1) (C) shall be payable in 4 equal installments due

quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

. . . .

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determina-

tion made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b) (2) (B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b) (2) (A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b) (1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3) (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b). Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to termination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the termination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title.

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1404. Alternative method of withdrawal liability payments

A multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with this chapter and with such regulations as may be prescribed by the corporation.

§ 1405. Limitation on withdrawal liability

- (a) **Unfunded vested benefits allocable to employers in bona fide sale of assets of employer in arms-length transaction to unrelated party; maximum amount; determinative factors**

(1) In the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of section 1384(d) of this title), the unfunded vested benefits allocable to an employer (after the application of all sections of this part having a lower number designation than this section), other than an employer undergoing reorganization under Title 11, or similar provisions of State law, shall not exceed the greater of—

(A) a portion (determined under paragraph (2)) of the liquidation or dissolution value of the employer (determined after the sale or exchange of such assets), or

(B) the unfunded vested benefits attributable to employees of the employer.

(2) For purposes of paragraph (1), the portion shall be determined in accordance with the following table:

If the liquidation or dissolution value of the employer after the sale or exchange is—	The portion is—
Not more than \$2,000,000	30 percent of the amount.
More than \$2,000,000, but not more than \$4,000,000.	\$600,000, plus 35 percent of the amount in excess of \$2,000,000.
More than \$4,000,000, but not more than \$6,000,000.	\$1,300,000, plus 40 percent of the amount in excess of \$4,000,000.
More than \$6,000,000, but not more than \$7,000,000.	\$2,100,000, plus 45 percent of the amount in excess of \$6,000,000.
More than \$7,000,000, but not more than \$8,000,000.	\$2,550,000, plus 50 percent of the amount in excess of \$7,000,000.
More than \$8,000,000, but not more than \$9,000,000.	\$3,050,000, plus 60 percent of the amount in excess of \$8,000,000.
More than \$9,000,000, but not more than \$10,000,000.	\$3,650,000, plus 70 percent of the amount in excess of \$9,000,000.
More than \$10,000,000	\$4,350,000, plus 80 percent of the amount in excess of \$10,000,000.

(b) Unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution; maximum amount; determinative factors

In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of—

(1) 50 percent of the unfunded vested benefits allocable to the employer (determined without regard to this section), and

(2) that portion of 50 percent of the unfunded vested benefits allocable to the employer (as determined under paragraph (1)) which does not exceed the liquidation or dissolution value of the employer determined—

(A) as of the commencement of liquidation or dissolution, and

(B) after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph (1).

(c) Property not subject to enforcement of liability; precondition

To the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a plan as an individual (whether as a sole proprietor or as a member of a partnership), property which may be exempt from the estate under section 522 of title 11, or under similar provisions of law, shall not be subject to enforcement of such liability.

(d) Insolvency of employer; liquidation or dissolution value of employer

For purposes of this section—

(1) an employer is insolvent if the liabilities of the employer, including withdrawal liability under

the plan (determined without regard to subsection (b) of this section), exceed the assets of the employer (determined as of the commencement of the liquidation or dissolution), and

(2) the liquidation or dissolution value of the employer shall be determined without regard to such withdrawal liability.

(e) One or more withdrawals of employer attributable to same sale, liquidation, or dissolution

In the case of one or more withdrawals of an employer attributable to the same sale, liquidation, or dissolution, under regulations prescribed by the corporation—

(1) all such withdrawals shall be treated as a single withdrawal for the purpose of applying this section, and

(2) the withdrawal liability of the employer to each plan shall be an amount which bears the same ratio to the present value of the withdrawal liability payments to all plans (after the application of the preceding provisions of this section) as the withdrawal liability of the employer to such plan (determined without regard to this section) bears to the withdrawal liability of the employer to all such plans (determined without regard to this section).

§ 1425. Adjustments in accrued benefits

(a) Amendment of multiemployer plan in reorganization to reduce or eliminate accrued benefits attributable to employer contributions ineligible for guarantee of corporation; adjustment of vested benefits charge to reflect plan amendment

(1) Notwithstanding sections 1053 and 1054 of this title, a multiemployer plan in reorganization may be

amended in accordance with this section, to reduce or eliminate accrued benefits attributable to employer contributions which, under section 1322a(b) of this title, are not eligible for the corporation's guarantee. The preceding sentence shall only apply to accrued benefits under plan amendments (or plans) adopted after March 26, 1980, or under collective bargaining agreements entered into after March 26, 1980.

(2) In determining the minimum contribution requirement with respect to a plan for a plan year under section 1423(b) of this title, the vested benefits charge may be adjusted to reflect a plan amendment reducing benefits under this section or section 412(c)(8) of title 26, but only if the amendment is adopted and effective no later than 2½ months after the end of the plan year, or within such extended period as the Secretary of the Treasury may prescribe by regulation under section 412(c)(10) of title 26.

. . . .

§ 1426. Insolvent plans

(a) Suspension of payments of benefits; conditions, amount, etc.

Notwithstanding sections 1053 and 1054 of this title, in any case in which benefit payments under an insolvent multiemployer plan exceed the resource benefit level, any such payments of benefits which are not basic benefits shall be suspended, in accordance with this section, to the extent necessary to reduce the sum of such payments and the payments of such basic benefits to the greater of the resource benefit level or the level of basic benefits, unless an alternative procedure is prescribed by the corporation under section 1322a(g)(5) of this title.

. . . .

§ 1431. Assistance by corporation**(a) Authority; procedure applicable; amount**

If, upon receipt of an application for financial assistance under section 1426(f) of this title or section 1441(d) of this title, the corporation verifies that the plan is or will be insolvent and unable to pay basic benefits when due, the corporation shall provide the plan financial assistance in an amount sufficient to enable the plan to pay basic benefits under the plan.

(b) Conditions; repayment terms

(1) Financial assistance shall be provided under such conditions as the corporation determines are equitable and are appropriate to prevent unreasonable loss to the corporation with respect to the plan.

(2) A plan which has received financial assistance shall repay the amount of such assistance to the corporation on reasonable terms consistent with regulations prescribed by the corporation.

(c) Assistance pending final determination of application

Pending determination of the amount described in subsection (a) of this section, the corporation may provide financial assistance in such amounts as it considers appropriate in order to avoid undue hardship to plan participants and beneficiaries.

§ 1451. Civil actions**(a) Persons entitled to maintain actions**

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for pur-

poses of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

§ 1461. Effective date; special rules

.

(e) (1) Except as provided in paragraphs (2), (3), and (4), the amendments to this chapter made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on September 26, 1980.

(2) (A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability, takes effect on April 29, 1980.

**PUBLIC LAW 95-214 [91 Stat. 1501]; Dec. 19, 1977
EMPLOYEE RETIREMENT INCOME SECURITY
ACT OF 1974**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone, for two years, the date on which the corporation first begins paying benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 4082(c) of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) is amended—

(1) by striking, "January 1, 1978" in paragraph (1) and substituting "July 1, 1979";

(2) by striking "January 1, 1978" in paragraph (2) and substituting "July 1, 1979";

(3) by striking "December 31, 1977" in paragraph (2) (B) and substituting "June 30, 1979";

(4) by striking "January 1, 1978" in paragraph (4) and substituting "July 1, 1979";

(5) by striking "December 31, 1977" in paragraph (4) (D) and substituting "June 30, 1979".

(b) Section 4082 of such Act is amended by adding at the end thereof the following new subsections:

"(d) The corporation shall present to the Committee on Education and Labor of the House of Representatives and the Committee on Human Resources and the Committee on Finance of the Senate a report which comprehensively addresses the anticipated financial condition of the program relating to mandatory coverage of multi-employer plans, including possible events which might cause the corporation to experience serious financial difficulty after July 1, 1979. Such report shall include an

explanation of any alternative courses of action which might be taken by the corporation to insure proper coverage of multiemployer plans and the proper financing of the program relating to such plans. If the report contains recommendations for amendments to this title, such recommendations shall be fully explained, and shall be accompanied by explanations of other options for legislative change considered and rejected by the corporation. The report shall be presented by July 1, 1978.

**PUBLIC LAW 96-24 [93 Stat. 70]; June 19, 1979
EMPLOYMENT RETIREMENT INCOME SECURITIES
ACT OF 1974**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for 10 months the date on which the corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, is further amended—

- (1) by striking "July 1, 1979" in paragraphs (1), (2) and (4) and substituting "May 1, 1980" in each such paragraph; and
- (2) by striking "June 30, 1979" in paragraphs 2(B) and 4(D) and substituting "April 30, 1980" in each such paragraph.

Approved June 19, 1979.

**PUBLIC LAW 96-239 [94 Stat. 341]; April 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY
ACT OF 1974—BENEFITS**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for two months the date on which the Pension Benefit Guaranty Corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214 and Public Law 96-24, is further amended—

(1) by striking "May 1, 1980" in paragraphs (1), (2), and (4) and substituting "July 1, 1980" in each such paragraph; and

(2) by striking "April 30, 1980" in paragraphs 2(B) and 4(D) and substituting "June 30, 1980" in each such paragraph.

Approved April 30, 1980.

**PUBLIC LAW 96-293 [94 Stat. 610]; June 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY
ACT OF 1974**

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for one month the date on which the corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, Public Law 96-24, and Public Law 96-239 is further amended—

(1) by striking "July 1, 1980" in paragraphs (1), (2), and (4) and substituting "August 1, 1980" in each such paragraph; and

(2) by striking "June 30, 1980" in paragraphs 2(B) and 4(D) and substituting "July 31, 1980" in each such paragraph.

Approved June 30, 1980.

**In the Supreme Court
of the United States**

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**APPELLANT'S BRIEF
OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND**

DAVID S. PAULL
PAULL & BARNETT
5441 S.W. Macadam Ave.
Portland, Oregon 97201
(503) 221-0077

WILLIAM B. CROW*
JAMES N. WESTWOOD
WILLIAM H. WALTERS
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

* *Counsel of Record*

QUESTION PRESENTED

In enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress amended certain provisions of the Employee Retirement Income Security Act of 1974. In particular, Congress modified the withdrawal liability of employers who withdraw from multiemployer pension plans. The question presented is whether in giving this modification limited retrospective effect Congress offended the due process clause of the Fifth Amendment.

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ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**APPELLANT'S BRIEF
OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND**

This appeal is from the judgment of the Court of Appeals for the Ninth Circuit entered May 20, 1983, declaring that the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") violates the Fifth Amendment due process rights of employers who with-

drew from multiemployer pension fund plans prior to the date the Act was signed into law but after its effective date. R. A. Gray & Company ("Gray") brought an action on September 29, 1981, seeking a declaration of the unconstitutionality of the Act. Gray named the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund") and the Pension Benefit Guaranty Corporation (the "PBGC") as defendants. The District Court found for defendants. Gray appealed and the Ninth Circuit reversed. In contrast to the holding of the Ninth Circuit, the Fourth Circuit more recently has concluded "that the provisions of the 1980 Act for retroactive withdrawal liability are valid and constitutional." *Republic Industries, Inc. v. Teamsters Joint Council, No. 83 of Virginia Pension Fund*, 718 F.2d 628, 639 (4th Cir. 1983).

The Trust Fund joins in the opening brief of its co-appellant, the PBGC. As a consequence, the Trust Fund's statement of the case will be abbreviated and its argument supplementary to that provided by the PBGC.

OPINION BELOW

The opinion of the District Court for the District of Oregon is reported at 549 F. Supp. 531 and the opinion and order are reproduced in the PBGC's jurisdictional statement at App. B 30a-49a. The opinion of the Court of Appeals for the Ninth Circuit is reported at 705 F.2d 1502 and is reproduced in the PBGC's jurisdictional statement at App. A 1a-29a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1983. The Trust Fund filed its notice of appeal on June 16, 1983. The Trust Fund filed its jurisdictional statement on August 19, 1983. On October 17, 1983, this Court noted probable jurisdiction and consolidated for purposes of oral argument the appeal of the Trust Fund, No. 83-291, with the appeal of the PBGC, No. 83-245. The jurisdiction of this Court is based on 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" The relevant statutory provisions are provided in the PBGC's jurisdictional statement at Appendix F 76a-104a.

STATEMENT OF THE CASE

Under the Employee Retirement Income Security Act of 1974 ("ERISA") the PBGC administers a system of insurance designed to protect employees whose pension plans terminate with insufficient funds. As originally enacted, ERISA provided that if an employer withdrew from a multiemployer pension plan, and that plan terminated within five years of the withdrawal, the employer would be liable for its proportionate share of any funds that the PBGC expended to provide re-

quired employee benefits. In 1977, Congress, concerned about the financial stability of multiemployer pension plans, asked the PBGC to prepare a comprehensive report on these plans. The PBGC submitted its report to Congress on July 1, 1978. On February 27, 1979, the agency presented Congress with a legislative proposal addressing the potential financial weakness of multiemployer pension plans. On May 3, 1979, legislation incorporating the PBGC's proposal was introduced in both houses of Congress. The formally introduced legislation adopted the PBGC's proposal to replace the contingent liability of employers with a requirement that an employer's withdrawal be subject to a fixed liability equal to his proportional share of the plan's unfunded vested liability. Both bills introduced on May 3, 1979, specified February 27, 1979, as the effective date for the proposed change in withdrawal liability.

After approval by the House Education and Labor Committee on April 3, 1980, and the House Ways and Means Committee on April 23, 1980, the House passed the Act on May 22, 1980, by a vote of 374-0. The Senate followed suit on July 29, 1980, by a vote of 85-1, after consideration and endorsement by the Senate Labor and Human Resources and Finance committees. President Carter signed the bill into law on September 26, 1980. In its final form, the Act made the new withdrawal provisions effective as of April 29, 1980.

In 1980, Gray was a contributor to a multiemployer pension plan administered by the Trust Fund. Gray

withdrew from the plan effective June 1, 1980. On July 24, 1981, the Trust Fund's trustees formally notified Gray of its withdrawal liability.

Gray filed a declaratory judgment action in the United States District Court for the District of Oregon on September 29, 1981. Gray sought, *inter alia*, a judgment that the retrospective application of the newly imposed withdrawal liability violated Gray's right to due process under the Fifth Amendment. On cross-motions for summary judgment, Judge James A. Redden upheld the constitutionality of the Act and, on August 11, 1982, entered judgment for the Trust Fund and the PBGC, the defendants. On the "Due Process and Retroactivity" issue specifically, the court found that

"imposition of withdrawal liability was intended to remove existing statutory incentives for employers to withdraw from troubled or potentially troubled plans, while providing that newly entering employers would not be saddled with obligations incurred prior to their entry into the plan. The withdrawal liability also was intended to insure that a withdrawing employer would fund a share of the obligations incurred during that employer's association with the plan." *R. A. Gray & Co. v. Oregon Washington, Etc.*, 549 F. Supp. 531, 536 (D. Or. 1982).

The court concluded that Gray had "not shown that the [Act] and its retroactive application are irrational solutions to a serious problem." *Id.* at 538.

Gray appealed to the Ninth Circuit. Gray's appeal was heard at oral argument with appeals in five related cases, and the Court of Appeals reversed the Oregon District Court. The Ninth Circuit balanced a variety of factors, including the equities of all involved, and concluded that "retroactive application of the withdrawal liability provision of the [Act] violates the due process right of employers who withdrew from the multiemployer pension plans before the Act became law." *Shelter Framing Corp. v. Pension Ben. Guar. Corp.*, 705 F.2d 1502, 1505 (9th Cir. 1983).

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit has held that the Multiemployer Pension Plan Amendments Act, in its retrospective application, violates the due process clause of the Fifth Amendment. The circuit court found two due process failings with the Act. These alleged difficulties are distinguishable, even though they are not clearly distinguished in the lower court's opinion; neither, however, supports the court's conclusion.

First, did Gray receive fair notice that Congress was likely to pass the Act? This Court has not recognized a due-process-of-lawmaking notice requirement. The Court, however, may find that although the public deserves notice of legislative activity, normal legislative processes normally provide constitutionally sufficient notice. In this case, Gray has not shown any divergence from generally acceptable legislative proce-

dures which would support a charge of inadequate legislative notice. Furthermore, the legislative history of the Act lends no credence to such a charge. In addition, although it has been argued below that employers such as Gray justifiably relied on pre-Act law, this argument would rule equally unconstitutional all legislation with retrospective effect, contrary to the teachings of this Court.

Second, is the Act substantively rational? An act of Congress is presumed constitutional until proven otherwise. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Gray, the complaining party, must establish that the Act is "arbitrary and irrational." Furthermore, as is clear from *Turner Elkhorn*, inquiry ends if the Court finds that the legislation in issue reflects a rational approach to a problem within Congress' power to address. The Court will not second-guess the wisdom of the legislature's chosen approach, nor will it review the elegance of the legislative craftsmanship nor the fairness of the end result. The Ninth Circuit, however, inappropriately based its constitutional judgment on the wisdom and fairness of the Act. Similarly, Gray's specific charges of substantive inadequacy concern only the wisdom of the Act. The rationality of the approach which Congress chose, and which the Act embodies, remains unimpugned.

ARGUMENT

The question presented here is the power of Congress to determine that the limited retrospective application of proposed regulatory modifications is needed to prevent the imminent passage of the corrective legislation from itself worsening the problem the legislation aims to correct. The Ninth Circuit, by a "balancing of the equities" test, found such legislation unwise and therefore unconstitutional. However, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Gray, the complaining party in the present case, is unable to meet its "heavy burden." 428 U.S. at 44 (Powell, J., concurring).

The question of whether the retrospective application of the withdrawal liability provisions of the Act violates due process comes to the Court with the benefit of two circuit court opinions as well as numerous opinions of district courts. In addition, the PBGC has provided extensive discussion in its opening brief. These facts, together with the requirement that Gray carry the burden of proof in this proceeding, suggest casting the Trust Fund's opening brief in the form of a response to arguments made below. In this way the Trust Fund may supplement, without duplicating, the argument of the PBGC and provide a more intensive analysis of some of the issues presented.

Due process arguments found in the pleadings and opinions below are of two sorts, procedural and substantive. One type of argument suggests that Gray did

not receive fair warning that the Act would contain retrospectively applicable withdrawal liability provisions. Gray has argued, for instance, that it justifiably relied on existing law and thereby was precluded from changing its position in anticipation of the newly-to-be-imposed withdrawal liability. In other words, according to Gray, Congress did not provide Gray with adequate notice of the lawmaking process.

The second type of argument questions substance rather than procedure. Gray's claim, generally stated, is that the presence or absence of certain features in the Act, as applied retrospectively, marks this legislation as arbitrary and irrational.

Section I below discusses the notice issue; section II, that of the rationality of the Act. *Turner Elkhorn*, it is argued, applies in each instance; it disposes of the contention of inadequate legislative procedure as well as the claim of irrational substance.

I. Congress, during the course of its consideration of the Act, provided such notice of the content and retrospective application of the Act as is constitutionally required.

Gray has argued that the Act is unconstitutional because Congress failed to give fair warning of the Act's expected retrospective application. The conclusion of Gray's opening brief to the Ninth Circuit, for instance, reads in its entirety as follows:

"The virtually unlimited withdrawal liability imposed by [the Act] was an entirely new departure. If Congress has the power to take that step at all in the face of collective bargaining agreements en-

tered into prior to enactment and relied upon by employers, it must at least be required to give such employers advance warning and an opportunity to adjust to their radically altered potential obligations. This court should hold the law invalid as applied to Gray and should further hold that Gray's motion for summary judgment should have been granted." Appellant's Brief of R. A. Gray & Co. at 20.

In its motion to this Court to affirm the decision of the Ninth Circuit, Gray likewise charges that Congress failed "to provide individual notice to persons contemplating behavior that might later become the basis for liability." Motion to Affirm at 8-9.

In addition, parties combined with Gray for oral argument at the Ninth Circuit contended—and the Ninth Circuit agreed—that employers, Gray included, reasonably relied on the state of the law as it existed prior to the passage of the Act. The reasonableness of such reliance would reflect the sufficiency or insufficiency of legislative notice.

A. This Court has not recognized a legislative notice requirement.

Turner Elkhorn, the Court's most recent case dealing with retroactive legislation, reaffirmed that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Turner Elkhorn*, 428 U.S. at 16 (citations omitted). No mention is made of any con-

stitutional requirement of notice, let alone individual notice, prior to the passage of legislation with retrospective effect. The test is simply whether the complaining party establishes that the legislation is arbitrary and irrational.

B. Normal legislative processes afford such notice as is constitutionally due.

As an alternative to holding that the due process of lawmaking involves no notice requirement, *Turner Elkhorn* may be read to hold that the legislative process itself, when conducted in a normal and legitimate manner, provides the public with constitutionally sufficient notice of Congress' legislative activities. Cf. *Bi-Metallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

Turner Elkhorn speaks of the burden on the party who complains of a due process violation "to establish that *the legislature has acted in an arbitrary and irrational way.*" 428 U.S. at 15 (emphasis added). The opinion in *Turner Elkhorn* focuses on whether the product of the legislative process was arbitrary and irrational. However, a claim of deprivation of due process as a result of insufficient notice of congressional lawmaking raises the question of whether the legislative process itself was arbitrary and irrational. On this issue also, the legislation comes to the Court with a presumption of constitutionality. If lack of legislative notice is alleged, the burden remains on the com-

plainning party to establish that Congress did not proceed to its legislative conclusion in a normal, accepted and acceptable manner. The complainant must show that Congress "acted in an arbitrary and irrational way," with a resulting denial of fair notice.

Gray complains of inadequate notice but has not alleged any failure on Congress' part to follow normal legislative procedures. Motion to Affirm at 8-9. Furthermore, the legislative history of the Act shows that Gray could not sustain such an allegation. See, e.g., *Peick v. Pension Ben. Guaranty Corp.*, 539 F. Supp. 1025, 1029-33 (N.D. Ill. 1982).

Gray may not have received the "individual notice" which it claims is its right. However, that is of no constitutional moment. Normal legislative procedures afford public notice of congressional activities. Due process requires no more. Any requirement of individual notice of impending legislation to potentially affected individuals would be enormously disruptive of the legislative process.

C. Gray did not justifiably rely on existing law.

Gray has argued, and the Ninth Circuit found, 705 F.2d at 1511, that employers in Gray's position justifiably relied on statutory provisions which regulated employers' withdrawal liabilities from multiemployer pension plans prior to the Act's becoming law. The Ninth Circuit reasoned that, since employers could not "predict with accuracy the final outcome of the legislative process," they reasonably relied

on existing law. *Id.* If this remark about the inability to anticipate the final outcome of the legislative process is taken as a general point about predictive certainty, then the reasoning plainly proves too much. For it would apply with equal force to any legislative product with retrospective effect and hence establish the unconstitutionality of all retrospective legislation. It is accepted, however, that some laws with retrospective effect do pass constitutional muster.

The argument, therefore, must be particularized; the reasoning must be that employers could not predict, i.e., had insufficient notice concerning, the content and effective date of the Act in particular.¹ However, for the reasons which follow, the particularized argument is no sounder than the general one.

First, as emphasized by the District Court in *Peick*, "It has long been a tenet of constitutional law that '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legitimate end.' *F. H. A. v. Darlington, Inc.*, 358 U.S. 84, 91,

¹ This apparently is the position of the Ninth Circuit. See especially the following remarks:

"We reject the argument that the employers should have known the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. See *Peick*, 539 F. Supp. at 1053. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June, 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the [Act] to pass." 705 F.2d at 1511.

79 S. Ct. 141, 146, 3 L. Ed. 2d 132 (1958) (citations omitted); accord, *Allied Steel*, supra, 438 U.S. at 249, 98 S. Ct. at 2724; *Veix v. Sixth Ward Building & Loan Assn.*, 310 U.S. 32, 38, 60 S. Ct. 792, 794, 84 L. Ed. 1061 (1940)." 539 F. Supp. at 1044.

Furthermore, multiemployer pension plans specifically, again in the words of *Peick*,

"have been subject to decades of pre-[Act] federal regulation under Section 165 (now section 401) of the Internal Revenue Code, section 302 of the Labor-Management Relations Act of 1947, and the Welfare and Pension Plans Disclosure Act of 1958. Moreover, and most significant, the 1974 enactment of ERISA demonstrated in the clearest possible way that contractual limitations on withdrawal liability were themselves susceptible to federal displacement. By its terms, ERISA voided all absolute exemptions, and installed in their place a regime of contingent liability. See p. 1030, supra. This development alone afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Id.*

Thus, employers who participated in multiemployer pension plans were on notice that future legislation well might modify existing regulations and thereby alter rights which employers otherwise would have. See Note, ERISA's Title IV and the Multiemployer Pension Plan, 1979 Duke L. J. 644, 670-71 (1979).

Second, as the District Court found, the pension plan to which Gray had been a contributor and from which it withdrew "recognized that the employers'

obligations were subject to statutory modification." 549 F. Supp. at 537. Moreover, as the Fourth Circuit acknowledged in assessing employer reliance on specific provisions of ERISA prior to the passage of the Act,

"since the enactment of ERISA, termination of *single* employer pension funds [had] been fully regulated and regulation of withdrawal from *multi-employer* pension funds was only postponed because of Congressional caution about the best way to approach the problem." 718 F.2d at 638 (emphasis added).

Gray thus had reason to anticipate future modifications of the multiemployer trust fund provisions of ERISA.

Finally, the legislative history of the Act reveals that ample notice was afforded of the intended retrospective application of the Act to withdrawal liability. From the outset, the Act envisaged retrospective application. On May 3, 1979, the date the bill was formally introduced, it carried a date of application of February 27, 1979, the date on which the PBGC had transmitted its proposal to Congress. That proposed date remained a feature of the Act through its consideration by two committees of the House and one of the Senate until, in June, 1980, the Senate Finance Committee advanced the effective date to April 29, 1980, where it remained. Thus, at all times from the date the bill was introduced until its eventual passage, the Act included an effective date of at least April 29, 1980. Furthermore, by April 29, 1980, the Act had

been under consideration for almost two years and had received approval of the House Education and Labor Committee, the House Ways and Means Committee, and the Senate Labor and Human Resources Committee.

The legislative history of the Act, together with the facts that multiemployer pension plans have a significant history of governmental regulation and that eventual changes in the withdrawal liability provisions of ERISA were anticipated, provides ample reason to conclude that sufficient notice was afforded here to satisfy the due process clause of the Constitution. Thus the particularized form of the argument that the final outcome of the legislative process was not predictable shares the failing of the generalized form of argument first considered. If either were accepted, Congress would be precluded from ever providing legislation with limited retrospective application. Gray did not, therefore, justifiably rely upon the regulatory scheme in effect prior to the passage of the Act.

II. Congress acted rationally in giving limited retrospective effect to the multiemployer withdrawal liability provisions of the Act.

Gray argued to the Ninth Circuit that the retrospective application of the withdrawal liability for employers participating in multiemployer pension plans was not a rational response to the problem which Congress sought to address in the Act. The

Court of Appeals agreed. Gray's present position is that "[t]he Court of Appeals correctly concluded . . . that Congress had acted arbitrarily and irrationally in including [the] provision [for retroactive liability] in the Act." Motion to Affirm at 6. Before attempting to assess the particular considerations adduced in support of the position of Gray and the Ninth Circuit, it is appropriate to inquire as to the test which should be brought to bear on a question of whether a legislative act is substantively adequate under the due process clause of the Fifth Amendment. Such an initial inquiry is particularly appropriate in this case where, as will be argued below, the Court of Appeals has applied an incorrect test in assessing the constitutionality of an act of Congress.

A. The analysis of *Turner Elkhorn* requires only that the legislative approach be rational, not that its implementation be wise.

Turner Elkhorn makes it quite clear, and it has not been disputed in this case, "that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. Furthermore, this Court has been equally explicit that it does not "sit as a 'superlegislature to weigh the wisdom of legislation'" *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)). See also *Turner Elkhorn* 428 U.S. at 18-19. What remains implicit in the *Turner Elkhorn* opinion is how the Court reviews the

retrospective application of congressional legislation for substantive validity so as to determine whether the complainant has shown that the legislation is "arbitrary and irrational" while at the same time eschewing assessment of "the wisdom of Congress' chosen scheme." *Turner Elkhorn*, 428 U.S. 18-19. For assistance in articulating the Court's approach we look to the body of the *Turner Elkhorn* opinion.

In *Turner Elkhorn* the Court reviewed the Black Lung Benefits Act of 1972 by which Congress sought to provide for compensation to "certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines" 428 U.S. at 5. Certain coal mine operators contested the constitutionality of the Act insofar as it operated retrospectively "to impose liability upon them for former employees' disabilities" *Id.* at 15. In addressing this issue, the Court first posted reminders that the complaining party has the burden to prove that the Act was arbitrary and irrational, that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," 428 U.S. at 16 (citations omitted), and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* (citations omitted). The Court then proceeded to observe that since "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively[,] [t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due pro-

cess" *Id.* at 16-17. Moreover, "the justifications for the latter may not suffice for the former." *Id.* at 17.

In response to the specific charge that the retrospective aspects of the Black Lung Act were unconstitutional, the Court first determined whether, in adopting these features, Congress had made a rational choice. It held that "it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators . . . or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health." *Id.* at 18. Congress in fact made the latter choice and the Court found that it was a rational cost-spreading approach. *Id.*²

The Court next took up the contention that the Black Lung Act inequitably allocated the burdens of providing the compensation the Act mandates. It is unfair, it was argued, to make early mine operators shoulder the major portion of the burden while newcomers to the industry may escape liability altogether. The Court's response to this line of reasoning was to dismiss it without any examination of its merit. Congress legitimately decided to provide compensation to victims of black lung disease and made a rational choice

² In the course of its inquiry into whether the Black Lung Act was rational in its approach, the Court remarked that it was hesitant "to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness" on the facts of the case before it, 428 U.S. at 17-18 (citations omitted). The Court in no way suggested that deterrence could never offer a basis for providing legislation with retrospective effect.

concerning how to spread the costs of that compensation. Whether or not the Black Lung Act operated fairly or unfairly in its retrospective effect was not a matter of proper judicial inquiry. In the Court's words,

"We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 18-19 (citations omitted).

B. The Ninth Circuit, in applying the Nachman test, unavoidably assessed the wisdom and fairness of the Act.

In determining whether the Act in its retrospective application complies with the requirements of due process, the Ninth Circuit applied a test derived from *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). While acknowledging that the Act "comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way," 705 F.2d at 1510, the court undertook to assess the rationality

of the retrospective features of the Act in terms of the following four factors:

“(1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens.” *Id.* at 1511.

These four categories are not separate and independent. The second, “prior regulation,” is, as the court admits, “another facet of reliance.” *Id.* at 1512. Prior regulation goes to the reliance interests of the withdrawn employers,³ though not, or only indirectly, to the other reliance interests canvassed by the first factor. Similarly, factor four, “moderating provisions,” is simply one aspect of the court’s discussion of number three, “equities.” With the latter category, the court itself states that it confronts “the difficult task of weighing the individual burdens on withdrawing employers against the policies Congress hoped to further by establishing a retroactive effect date for the [Act].” *Id.* at 1512. By moderating provisions the court simply has in mind those provisions of the Act that may lessen in some way “the individual burdens on withdrawing employers.”

³ This has been elaborated upon in the earlier discussion of whether employers were put on notice, sufficient for constitutional purposes, of possible modifications in existing withdrawal liability provisions of ERISA.

Collapsing the “four factors” into those of reasonable reliance and equity helps to show that, although the ostensible purpose of the Ninth Circuit’s examination was to assess the rationality of the Act, in point of fact the court engaged in a fundamentally equitable inquiry. On the one hand, it inquired whether employers reasonably relied on preexisting law. On the other, it employed the chancellor’s scales to weigh whether it was fair for employers to shoulder their withdrawal liability, given the purpose that Congress sought to achieve. The approach taken by the Ninth Circuit thereby is revealed to be at odds with that set out and followed in *Turner Elkhorn*. The Court of Appeals, with its preeminently equitable perspective, unavoidably passed on the wisdom of the Act, rather than its rationality, in assessing the constitutionality of the legislation.⁴

⁴ Although the Trust Fund believes that the *Nachman* test, as applied by the Ninth Circuit, misconstrues the nature of due process inquiry into the substantive adequacy of a legislative act, we would maintain that the Ninth Circuit was wrong on its own terms and that, assuming, *arguendo*, the appropriateness of the *Nachman* test, Gray still fails to meet its burden of proving a due process violation. In this regard, in addition to the recent opinion of the Fourth Circuit, we would again direct the Court’s attention to the thoughtful opinion of Judge Susan Getzendanner. *Peick*, 539 F. Supp. 1025.

The *Peick* court, applying the *Nachman* analysis, found that the retrospective features of the Act caused no violation of due process, although the court considered the question a “close call.” *Id.* at 1056. In the latter regard, however, we would note the court’s candid remark that it was assum[ing] that contract clause principles are relevant in this suit. If they are
(Footnote continued)

C. Specific objections to the content of the Act go to the wisdom, and not the rationality, of the Act

The specific objections offered by Gray and taken up by the Ninth Circuit to the content of the Act simply amount to the complaint that Congress did not legislate well enough. Congress did not target the withdrawal liability provisions as tightly as it might

not, the case for Congress is much clearer." *Id.* n.80 (citations omitted).

Peick's remark about contract clause principles raises two questions. Do contract clause principles properly apply in this case? If so, does the *Nachman* analysis articulate those principles? On the first of these questions, we believe that this Court's recent cases have distinguished between the levels of scrutiny called for by the contract and due process clauses and have made it clear that the contract clause imposes a stiffer requirement on a state than the due process clause requires of Congress. Compare *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, *reh'g denied*, 439 U.S. 886 (1978), and *United States Trust Co. v. New Jersey*, 432 U.S. 1 (1977), with *Turner Elkhorn*, 428 U.S. 1 (1976). The due process test of *Turner Elkhorn*, and not contract clause principles, applies in this case.

On the second question, we take no position as to whether the *Nachman* test would be appropriate in a contract clause setting. Still on *Nachman*, however, although this Court granted review and affirmed the Seventh Circuit's judgment on statutory grounds, several courts have concluded that the Court endorsed *sub silentio* the constitutional aspect of *Nachman* as well. See, e.g., *Republic Industries*, 718 F.2d at 636 n. 9. Be that as it may, we find no reason to believe that the Court approved the particular analysis used by *Nachman* in reaching a constitutional conclusion. Thus, this Court has not sanctioned the *Nachman* test for due process analysis; nor should it.

have, consistent with its announced purposes. As a result, it is alleged, the Act has unfairly caused hardship. The following passages are quite typical, if not quite exhaustive, of this type of complaint.

"The employers subjected to retroactive withdrawal liability under [the Act] . . . are required to contribute to the plan's trust fund, without any showing of need, simply to provide a nonspecific supplement to the fund's other income." Motion to Affirm at 15.

"Congress made no attempt to limit the retroactive application of [the Act's] withdrawal liability to situations in which there was any danger that the employee-beneficiaries' legitimate expectations of the plan might not be met." Motion to Affirm at 15.

"The withdrawal liability imposed on the employers for their pre-[Act] termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans." 705 F.2d at 1514.

The fundamental response to such objections as these is that "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. at 729. Whether Congress could have more equitably tailored the implementation of its chosen approach to strengthening multiemployer pension plans "is not a question of consti-

tutional dimension.”⁵ *Turner Elkhorn*, 428 U.S. at 19.

It has been contended that “[t]he effective date of the Act was arbitrarily fixed.” 705 at 1513.⁶ Even if that were true, however, it would not in the slightest suggest that it was arbitrary and irrational to incorporate into the Act a provision of limited retroactivity.⁷

⁵ A separate question, but one which this Court need not reach, is whether the Act represents such a poor job of legislative craftsmanship as Gray alleges and the Ninth Circuit found. Other lower courts have discussed the perceived harshness to certain employers in the light of the Act’s mitigating provisions and have concluded otherwise. *See, e.g., Republic Industries*, 718 F.2d 628, and *Peick*, 539 F. Supp. at 1025.

In addition, and despite the Ninth Circuit’s voiced assurance that the above-quoted remarks are only addressed to the retrospective features of the Act, 705 F.2d at 1514, it would appear that the type of objection here considered would apply equally to the prospective application of the modifications of employer withdrawal liability. However, the constitutionality of the prospective features of the Act is not at issue.

⁶ Motion to Affirm at 23 (“No explanation for the April 29 date was offered.”).

⁷ Within some range of possible dates of application of the Act there may have been no better reason to select any one than any other. In just that sense, then, it would be “irrational” to select any specific date for the effective date of the Act. And yet, it is not “irrational” to make the Act retroactive; i.e., it is not “irrational” to select *some* date as the effective date of the Act.

This is a form of the familiar lottery paradox. In a fair lottery with a large number of tickets, the odds are against any particular ticket being the winning ticket. It is then “irrational” to expect any particular ticket to be the winner. And yet, it is perfectly “rational” to expect *some* ticket to be the winner.

Congress enacted the Act to protect the financial soundness of multiemployer pension plans. The legislature was concerned that existing law encouraged employer withdrawals. Responsive to its concern, Congress chose to impose a noncontingent withdrawal liability upon employers who withdraw from a plan. Then, so that the passage of the Act itself would not exacerbate the problem the Act was designed to correct, Congress gave limited retrospective effect to the new withdrawal provisions. The legitimacy of Congress' purpose and the rationality of its chosen approach can scarcely be in doubt. Furthermore, consistent with *Turner Elkhorn* and the cases it draws upon—consistent indeed with the separation of the legislative and judicial powers under our constitutionally created system of government—the wisdom or fairness of the specific measures adopted to implement the chosen approach are not “of constitutional dimension.”

In sum, the Act's content is not irrational and thus does not offend the due process clause of the Fifth Amendment.

CONCLUSION

Gray contends that Congress “acted in an arbitrary and irrational way” both procedurally, in failing to provide constitutionally adequate notice of the retrospective effect of the Act, and substantively, in making the withdrawal liability provision retroactive at all. First, however, the normal legislative process whereby

a bill becomes law normally provides such notice as is constitutionally required and it did so in this instance. Second, Congress pursued a rational approach to the need it perceived of strengthening multiemployer pension plans; and the legislative details employed in implementing Congress' chosen approach are not a proper subject of due process scrutiny. In both its process and its product Congress is not to be faulted on due process grounds.

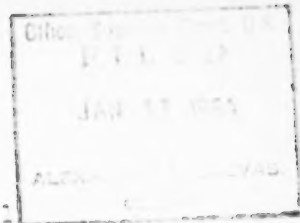
Therefore, the judgment of the Ninth Circuit that the Act is unconstitutional in its retrospective application should be reversed.

Respectfully submitted,

WILLIAM B. CROW
JAMES N. WESTWOOD
WILLIAM H. WALTERS
MILLER, NASH, WIENER, HAGER
& CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

DAVID S. PAULL
PAULL & BARNETT
5441 S.W. Macadam Avenue
Portland, Oregon 97201
(503) 221-0077

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No. 83-245 and No. 83-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

and

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE R. A. GRAY & COMPANY

MILDRED J. CARMACK
SCHWABE, WILLIAMSON,
WYATT, MOORE &
ROBERTS

THOMAS M. TRIPLETT
1200 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 222-9981

Of Counsel

Counsel of Record for
Appellee R.A. Gray &
Company

QUESTION PRESENTED

Whether, when Congress enacted the Multiemployer Pension Plan Amendments Act of 1980, it violated the Due Process Clause of the Fifth Amendment by retroactively imposing a substantial new liability on employers who withdrew from multiemployer pension plans before the law's enactment and who, therefore, at the time they withdrew, had no notice of the new law's requirements and no opportunity to conform their conduct to its provisions?

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SUPPLEMENTAL STATEMENT OF THE CASE

With the enactment of MPPAA, Congress
created a completely new legislative scheme
regulating withdrawal from multiemployer

plans.¹ Instead of requiring the PBGC to guarantee benefits for employees of terminated plans, as it had originally done in ERISA, Congress required the trustees of multiemployer plans to collect from withdrawing employers a "withdrawal liability" in addition to the contributions which those employers had made pursuant to

¹A multiemployer plan is specifically designed to accommodate changes in employer participants. While some employers may withdraw, and new employers may become contributors, the plan itself continues under the independent management of its trustees. Multiemployer plan funding operates on the principle that one employer's withdrawal will be offset by entry of others or by expansion of covered employment with existing contributors. H.R. Rep. No. 869, Pt. I, 96th Cong., 2d. Sess. (1980) *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2921-22.

In the present case the record shows that at the time of Gray's withdrawal the plan was actuarially sound and had been reducing its unfunded vested liability (see note 19, *infra*). The plan is in excellent financial health. Gray's withdrawal has not jeopardized its existence or the pension rights of its beneficiaries.

collective bargaining agreements.² The liability is calculated by the trustees, who choose one of several formulas based on an employer's past contributions to the plan and on the plan's unfunded vested liabilities at the time of withdrawal. 29 U.S.C. §§ 1381, 1382, 1391 (Supp. V 1981).

Withdrawal liability under the MPPAA differs drastically from termination liability in the case of single-employer plans (and from termination liability as originally envisioned for multiemployer plans under ERISA). It has the following significant features:

²The change was made as the result of a PBGC study which, as described by the Ninth Circuit's opinion in this case, informed Congress that ERISA "*might* encourage termination of multiemployer pension plans," that employers "*might* choose to terminate their plans," that active employees "*might* also desire termination" under certain conditions, and that these factors taken together "*might* act as an incentive to plan termination." J.S. 17a (emphasis added).

1. Withdrawal liability payments are made directly to an ongoing plan instead of to the PBGC after a plan has terminated.

2. The withdrawal liability must be assessed by the plan's trustees whether or not the plan is likely to need the funds in order to pay vested benefits.

3. The plan's trustees are not required to use the withdrawal liability payments to reduce the plan's unfunded vested liabilities.

4. Withdrawal as defined by MPPAA includes both voluntary and involuntary actions by employers.

5. Withdrawal liability must be assessed against employers who had withdrawn during the five months before the MPPAA became law. This provision for retroactive application was held invalid by the United States Court of Appeals for the Ninth Circuit and is the provision which is at issue in this case.

Gray is one of the employers who were caught by the law's retroactive date. Gray is a construction company which, by 1980, had contributed to a multiemployer plan for 15 years pursuant to successive collective bargaining agreements. During those 15 years Gray had contributed \$398,095 (J.A. 14). The plan's governing document provided that each individual employer's liability was limited to the contributions required by the collective bargaining agreement and that individual employers were not liable for the plan's debts (J.A. 117-18).

On February 14, 1980, more than seven months before MPPAA became law, Gray had given notice, as required by its collective bargaining agreement, that it intended to terminate that agreement (J.A. 19). The agreement expired on May 31, 1980 and negotiations in the meantime had not resulted in a new agreement (J.A. 159-61).

On June 2, 1980 the union began to picket Gray (J.A. 14). However, 63 percent of Gray's employees resigned from the union, and all of those who resigned crossed the picket line and continued to work for Gray (*id.*; J.A. 13). Thus the union lost majority status and its picketing, which continued for many months thereafter, was found to be informational only (J.A. 13; 144).

As of June 1, 1980, as a result of the above events, Gray was no longer obligated to contribute to the multiemployer pension plan. Almost four months later, on September 26, 1980, the MPPAA became law. Because the expiration of Gray's collective bargaining agreement constituted a withdrawal from the plan as defined by the MPPAA, 29 U.S.C. § 1383 (Supp. V 1981), the plan's trustees, as required by MPPAA, notified Gray that it had incurred a

withdrawal liability which the trustees calculated to be \$201,359 (J.A. 9).

Gray, as a general contractor, analyzes its costs in order to bid competitively on projects. Labor costs are a significant factor in that analysis. In preparing such bids prior to the enactment of MPPAA, Gray had factored in its contractual cost of pension contributions. It had not factored in a cost for withdrawal liability, however, because no such liability existed (J.A. 14). If Gray had known that withdrawal from its pension plan would subject it to substantial additional liability, it would have considered various alternative courses of action by which it might have avoided incurring a withdrawal liability or would have included in its bids a cost factor to take that liability into account (*id.*).

The United States Court of Appeals for the Ninth Circuit, after carefully

examining the retroactive application of MPPAA's withdrawal liability provisions to employers in Gray's position, held that those provisions violated Gray's right to due process of law. Therefore, the court did not have to consider Gray's other constitutional challenges to the MPPAA (J.S. 27a; J.A. 3-5).

SUMMARY OF ARGUMENT

One of the most important components of the concept of due process of law, as guaranteed by the Fifth Amendment to the United States Constitution, is that of notice at a time when notice is meaningful. As applied to new legislation, that means that individuals are entitled to be informed that certain conduct will have consequences in the future which differ from its consequences in the past. It also means that Congress must give that notice by following the Constitution's procedural requirements for the enactment of a law.

Congressional activity suggesting the possibility of a new law is not notice for due process purposes.

Like other constitutional guarantees, the due process guarantee of advance notice is not absolute. Special circumstances may justify substituting some other procedure in particular cases. But the special justification must be real and it must be specific.³ It is not enough that Congress may have "rationally" wished to reach backward in time and apply the standards created by a new law to conduct that took place before that law existed. If that

³The brief submitted by Amicus Curiae Republic Industries, Inc. contains additional discussion of the requirement that special or extraordinary justification be shown when Congress retroactively imposes substantial new duties or liabilities and thus fails to provide the meaningful notice which the Due Process Clause normally requires. Gray asks the Court to consider the arguments and authorities presented there, as well as those in this brief, as support for Gray's position.

justification would suffice, all new laws could be made retroactive. Individuals would have no protection at all against Congressional alteration of the consequences of closed transactions.

When considering the validity of the retroactive application of a law which imposes substantial new duties or liabilities, this Court has examined various factors and found a number of considerations to be significant. Among them are: (1) the likelihood that affected individuals made deliberate choices of action based on the existing legal situation; (2) the degree of correspondence between the new duty or liability and the harm or costs which it was intended to address; (3) the existence of legitimate expectations which were not being met under the prior law; and (4) the nature and weight of the public interest in having the

new law apply retroactively as well as prospectively.

The retroactive withdrawal liability provisions of the MPPAA deprived employers of the opportunity to plan for the consequences of conduct which was complete before the law's enactment. They exact substantial (and in some cases crippling) payments from employers for the purpose of avoiding a mere possibility of harm. If there are instances in which that harm is likely (rather than merely theoretically possible), the law's retroactive provisions exact payments from employers whose conduct may not be related to any danger which exists. They exact those payments although there could have been no legitimate expectations that any such payments would or should be made. And they are premised on inaccurate assumptions about the probable reasons for the employer's pre-enactment conduct.

The relationship between the MPPAA withdrawal liability provisions and the consequences of actions by employers to which they have been retroactively applied is indirect and speculative at best. That kind of indirect and speculative relationship cannot provide the necessary special justification for allowing Congress to dispense entirely with the meaningful notice which the Due Process Clause requires in all but unusual cases.

ARGUMENT

- I. The Right To Due Process Of Law Means That, Unless Special Justification Is Shown, Individuals Are Entitled To Advance Notice That In The Future Specified Conduct Will Result In A Substantial New Duty Or Liability.

The PBGC has characterized as the "central issue in this case" the question whether Congress may "rationally act" to

". . . discourage
last-minute efforts to nullify

the economic impact of legislation that is on the verge of enactment *by announcing that a pending bill, if enacted into law*, will take effect as of a date during the final stages of Congress' deliberation, and then incorporating that date into law." (PBGC Br. 35) [Emphasis added.]

That question must be answered "No."

The question appears to assume that if the Court determines that what Congress has attempted is "rational" it must uphold the retroactive provisions of MPPAA. *See also* PBGC Br. 21-22, 28. That assumption is wrong. "Rationality" is not the touchstone here. If it were, Congress could make every statute retroactive on the theory that retroactive application was a rational way of insuring that a new law had maximum effect.

The crucial question is not whether what Congress has attempted is rational in the sense that it could serve Congress's apparent purpose. The crucial question is: *how does Congress act?* The PBGC assumes

that Congress may act by "announcing" its intentions as to future legislation. Congress does not legislate by announcement. Article I of the United States Constitution prescribes certain minimum steps essential to legislation. Both full houses of Congress and the President must participate in the enactment of law.⁴

Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764, 2787 (1983). See also *American Federation of Gov. Employees v. Pierce*, 697 F.2d 303, 306

⁴Art. I, § 1 provides:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Art. I, § 7 provides in clause 2:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . ."

See also Art. I, § 7, cl. 3.

(D.C. Cir. 1982) (Congress may not legislate through action by committee of each house).

The minimum legislative steps required by Article I are designed to "protect the people from the improvident exercise of power" and to "assure that both Houses of Congress and the President participate in the exercise of lawmaking authority."

Immigration and Naturalization Service v. Chadha, supra, 103 S. Ct. at 2787-88 and n. 22. They represent "hard choices" which were "consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 2788. They do not allow for shortcuts.⁵ Both houses of

⁵The fact that a procedure adopted by Congress is "efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Immigration and Naturalization Service v. Chadha, supra*, 103 S. Ct. at 2780-81.

Congress must "concur in the enactment of positive law that alters individuals' substantive rights." *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 434 (9th Cir. 1980), *reh. denied* (1981), *aff'd Immigration and Naturalization Service v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983).

If the right to due process of law has any meaning at all as a protection against improper legislative action, it must include, at a minimum, a requirement that Congress employ the very procedures which the Constitution makes essential to the enactment of legislation. Any argument that liabilities may be imposed retroactively because Congress has "announced"⁶

⁶The announcement upon which PBGC relies was not the result of action by Congress as a whole. Neither house of Congress even considered the MPPAA until May 22, 1980. Prior to that date the only "announcements" were introduction of the

that it might do so in the future is based on mistaken premises about our basic system of government. *Congress has no power to require citizens to conform their conduct*

⁶(continued) bill and committee proceedings. The two houses of Congress did not agree on the MPPAA in its final form until September 19, 1980. 1980 U.S. Code Cong. & Ad. News 2918.

PBGC suggests that Gray should have devined from media coverage that new withdrawal liability would be enacted and would operate retroactively (PBGC Br. 35-36 n. 33). It has attempted to support that suggestion by attaching to its brief a newspaper article reporting that the House Committee on Education and Labor had approved a bill containing one retroactive provision, that the House Ways and Means Committee had approved a bill containing entirely different retroactive provisions, that the full House had not yet acted, and that "a similar measure is working its way through the Senate" (PBGC Br. 6a). It has also attached to its brief a wire service release dated a month later reporting that as of April 29, 1980 the Senate Finance Committee had determined that PBGC's mandatory insurance of multiemployer plan benefits should be delayed until July 1 and that changes in ERISA's "guarantee provisions" should be made retroactive (PBGC Br. 7a). Anyone noting these successive news reports could only have concluded that ultimate Congressional action, and the form it might take, were totally uncertain.

to standards contained in a bill which may or may not become law. When it takes action with the "purpose and effect of altering the legal rights, duties and relations of persons," it must do so by legislating. *Immigration and Naturalization Service v. Chadha, supra*, 103 S. Ct. at 2784.

This Court has clearly rejected the argument made by the PBGC. In *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928), it stated unambiguously that citizens

" . . . cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

Two important concepts are inherent in that passage. The first is that until the legislative process is complete there is no law, and that individuals cannot be held to

standards which do not yet exist.⁷ The second is that for due process purposes

⁷A contrary rule would not only be unconstitutional but unworkable. At what point in the legislative process would citizens be held to constructive notice that their rights and liabilities were to be retroactively altered in the future? At the time a bill was introduced? When one congressional committee acted favorably on a bill? Two committees? And which version of proposed legislation would provide that notice? The Senate version of the MPPAA was changed in 335 particulars in the 30 days prior to July 29, 1980. 126 Cong. Rec. S10167 (daily ed. July 29, 1980) (remarks of Sen. Armstrong).

On occasion this Court has suggested that the pre-enactment legislative process can provide constructive notice of the probable retroactive effects of legislation. It has done so, however, only in cases involving the kinds of changes in tax laws which have been consistently upheld on other grounds without resort to concepts of constructive notice. *United States v. Darusmont*, 449 U.S. 292 (1981); *United States v. Hudson*, 299 U.S. 498, 501 (1937).

Moreover, the Court has carefully distinguished such cases from those in which retroactive imposition of an entirely new kind of liability which could not have been anticipated was held invalid: *United States v. Darusmont*, *supra*, 449 U.S. at 299; *Welch v. Henry*, 305 U.S. 134, 147, *reh. denied* 305 U.S. 675 (1938).

citizens are entitled to notice of what legal consequences of a course of conduct are, not what they may possibly become, and to an opportunity to conform their conduct to the requirements of new legislation.

A very recent decision has recognized the importance of that notice and opportunity:

" . . . Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, *the two-year grace period* included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have an opportunity to become familiar with its terms. . . ." *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 793 (1982). [Emphasis added.]

If, as *Texaco* suggests, the mere enactment of a law may not provide sufficient notice if it does not give the citizen adequate opportunity to plan or to conform his post-enactment behavior to the law's new requirements, surely special justification

must be advanced to permit retroactive application of a statute which alters the consequences of pre-enactment behavior.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, reh. denied 439 U.S. 886 (1978), one of the vices which this Court identified in a state statute which was invalid under the Contract Clause was that it took effect the day after its passage, without any provision for gradual applicability or grace periods. The lower court had improperly

" . . . rejected out of hand the argument that employers were constitutionally entitled to some grace period to adjust their pension planning." 438 U.S. at 249, n. 23.⁸

⁸Principles and considerations relevant to an examination of legislation under the Contract Clause are also relevant to a due process analysis. In *Veix v. Sixth Ward Building & Loan Ass'n of Newark, N.J.*, 310 U.S. 32 (1940), this Court, considering constitutional challenges to a state statute, held that it did not violate the Contract Clause and, having so held, stated

And, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976), the court was careful to point out that although the Black Lung Benefits Act of 1972 "has some retrospective effect," it nevertheless imposed no new liability until 1974, two years after its passage.

⁸(continued) that separate consideration of the legislation under the due process clause of the Fourteenth Amendment was "wholly unnecessary." 309 U.S. at 41. Similarly, in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934), having determined that a state statute did not violate the Contract Clause, the Court held that its discussion of that subject "is also applicable to the contention presented under the due process clause." See also *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 278, n. 31 (1969):

"Although the constitutional prohibition of the impairment of contracts, U.S. Const., Art. 1, § 10, applies only to the States, we have held that '[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.' *Lynch v. United States*, 292 U.S. 571, 579 (1934)."

If a retroactive law is to be held valid, it cannot be simply on the ground that pre-enactment activity by Congress provided constructive notice of possible future changes in the governing standards, nor can it be enough that there is some "rational" connection between a retroactive effective date and Congress's desire to make a new law as effective as possible. If retroactive legislation were upheld on those grounds, there would be no limit to Congress's power to attach new consequences to past actions. Citizens could never be confident that closed transactions were truly closed, nor could they plan their activities with any assurance on the basis of today's legal rights and responsibilities. Tomorrow's legislation could reach back and erase the premises upon which those plans were based.

The authors of the Constitution labored to protect citizens from just such

capricious actions by their government and especially by the legislature.⁹ The constitution's procedural requirements and the right to due process of law mean that citizens are entitled to know what the governing law is at a time when that knowledge means something.

To be sure, this Court has held that new laws are not invalid simply because they disturb some previously settled expectations.¹⁰ It has never held that Congress is totally without power to pass laws that have retroactive effects. It has held, however, that when Congress creates a new liability based on past acts or closed transactions, the retroactive application of the law must be separately justified; a

⁹See *Chadha v. Immigration and Naturalization Service*, *supra*, 634 F.2d at 433-34, collecting citations to contemporary sources.

¹⁰See *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 16.

justification which is adequate for prospective action will not necessarily suffice to justify the same action applied retroactively. *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 16-17.

New legislation may have many different kinds of retroactive effects, even when it is prospective in application. Perhaps no single standard for testing the constitutionality of statutes which are retroactive in either application or effect could be created. This Court has not formulated one.¹¹ It has rarely confronted

¹¹ It has stated that retrospective legislation is not generally prohibited by the Due Process Clause unless the consequences are particularly "harsh and oppressive." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, n. 13 (1977), citing *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Whether or not the operation of a retroactive statute is "harsh and oppressive" can only be determined by examining the impact of the law, the nature and weight of the purposes it was intended to

(Footnote continued on next page.)

legislative attempts to create retroactively an entirely new liability triggered by pre-enactment conduct comparable to the statute at issue in this case. When faced with such a statute in the past, it has held the law's retroactive application unconstitutional, as in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) and *Untermeyer v. Anderson*, *supra*. Even when a statute was prospective in application, the Court has held it invalid if its retroactive effects were harsh, *Allied Structural Steel Co. v. Spannaus*, *supra*, or upheld it only after finding a special justification.

For example, in *Usery v. Turner Elkhorn Mining Co.*, *supra*, the retroactive effects of the Black Lung Benefits Act were

¹¹(continued) serve, and the need for retroactivity in order to serve those purposes.

approved because (1) the mine operators had been aware of the disease and its dangers for at least 20 years; (2) the operators did not contend that they would have taken greater precautions to protect their employees if the law had imposed liability at the time; (3) there was a direct relationship between actual damage (disability resulting from the operators' former employees' work in the mines) and the liability imposed on individual employers; and (4) under the new law the government, not the mine operators, would be responsible for providing most of the benefits during the early years of the law's operation.

The first two factors alone would probably not have sufficed.¹² The direct

¹²" . . . we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness" 428 U.S. at 17-18. [Citations omitted.]

relationship between each employer's liability and the actual injury to its former employees was especially important:

" . . . the point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored -- to allocate to the mine operator an actual, measurable cost of his business." 428 U.S. at 19.

Different kinds of retroactive legislation have called for different kinds of justification. Retroactive changes in the tax laws, when they did not go so far as to create an entirely new and unanticipated kind of liability, have been upheld on the special ground that they are a means of allocating among citizens the ongoing costs of government. *United States v. Darusmont*,

449 U.S. 292, 298, (1982).¹³ Objections to retroactive effects of a new law have been rejected when it appeared that the complaining party had voluntarily acquired property which was already regulated "in the particular" to which he later objected. *Veix v. Sixth Ward Building & Loan Assn. of Newark, N.J.*, 310 U.S. 32, 38 (1940). And the Court held that a 1954 change in the National Housing Act could constitutionally be applied to property which had been insured under the Act since 1949, where the change was merely a clarification of prior law and imposed no penalty or liability for any actions taken prior to its enactment. *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 (1958) *reh. denied* 358 U.S. 937 (1959). The

¹³Changes in the gift tax laws which retroactively created an entirely new and unanticipated liability have been held invalid. See *Welch v. Henry, supra*, n. 7, 305 U.S. at 147 (collecting cases).

considerations which led the Court to uphold those laws do not exist in this case. MPPAA's retroactive creation of a substantial new liability poses a different kind of problem.

A law which directly and retroactively imposes a new liability for past acts is one which, by its very nature, provides no notice in the constitutional sense. If it is to be upheld, it must be because there is special justification for dispensing with notice.

In analogous settings, the Court tests the adequacy of notice of judicial proceedings by identifying and weighing the relevant factors.¹⁴ Similarly, when testing the adequacy of a law's provision for a hearing in connection with governmental deprivation of liberty or property, it

¹⁴See, e.g., *Mennonite Bd. of Missions v. Adams*, ___ U.S. ___, 103 S. Ct. 2706, 2711-12 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

balances the relevant factors.¹⁵ In other words, the Court examines the process the legislature has provided in particular cases to determine whether a specific form of procedure is justified in light of the circumstances and interests involved.

When Congress has dispensed entirely with notice and the opportunity to conform one's conduct to the standards created by a new law, and has attached a new liability to pre-enactment conduct, this Court should require a special and particularized showing of justification for such a departure from the procedures which normally constitute due process of law.

¹⁵See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 90-91, reh. denied 409 U.S. 902 (1972) (postponement of hearing until after taking must be justified by extraordinary circumstances); *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring at least informal hearing before suspension of high school student).

II. Congress Was Not Justified In Dispensing With The Notice Normally Required By The Due Process Clause And Imposing Retroactively Liability Based On Prior Withdrawals.

In prior cases in which the retroactive effect or application of a new law was challenged, this Court has examined various kinds of circumstances and considerations.¹⁶ The following discussion of

¹⁶The Ninth Circuit adopted the analysis employed in *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional grounds*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 359, *reh. denied* 448 U.S. 908 (1980). In that case the Seventh Circuit, when considering the validity of a prospective law with some retroactive effects, identified and examined four relevant factors. 592 F.2d at 960. This Court has quoted at length and with apparent approval from that analysis, 446 U.S. at 367, n. 12, but has not expressly adopted it.

Whether or not the *Nachman* analysis is appropriate in the setting in which it was created, it should not limit the Court's examination of the validity of a law which

(Footnote continued on next page.)

the MPPAA's withdrawal liability provisions is organized to correspond to some of the considerations which this Court has found to be significant.

1. The Change In The Law Not Only Upset Settled Expectations But Also Altered The Consequences Of Deliberate Choices Made In The Past By Attaching Unanticipated New Duties Or Liabilities.¹⁷

A multiemployer plan is one to which an employer is obligated to contrib-

¹⁶(continued) is retroactive not only in some of its effects but also in its direct application. The ultimate question is not whether the *Nachman* test is satisfied, but whether there was adequate special justification for Congress to dispense with meaningful notice.

¹⁷See, e.g., *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 17, n. 16:

"Whether or not a person who could have anticipated the potential liability attaching to

(Footnote continued on next page.)

ute by virtue of a collective bargaining agreement. 29 U.S.C. § 1301(a)(3)(B) (Supp. V 1981). When negotiating such an agreement, an employer must take into account all of its labor costs, including its pension contributions. Proposed total compensation rates which differ by only a few cents per hour may be the subject of

¹⁷(continued)

his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax. . . ."

intense and difficult bargaining, or even the cause of inability to reach agreement. The pension plan involved in this case, like most others, provided that Gray's liability with respect to the plan would be "limited to the contributions required by the Collective Bargaining Agreement" (J.A. 117-18).¹⁸ Having negotiated and executed the collective bargaining agreement, Gray relied on its provisions, including the agreed-upon pension contributions, when bidding on construction jobs (J.A. 14). It had no reason to

¹⁸The District Court in this case mistakenly concluded that because the plan provision limiting Gray's obligations for contributions to those required by its collective bargaining agreement contained the words "except for liabilities which may result from provisions of ERISA," the imposition of new liabilities was contemplated by the plan itself (J.S. 39a-40a). The plan language says nothing about *changes* in ERISA. It simply recognizes that *existing provisions* of ERISA might require additional contributions if the plan is terminated.

include in its planning any cost factor for additional pension plan contributions in the event it could not reach agreement with the union on a new collective bargaining agreement. *Id.*

Under the provisions of ERISA before its amendment by MPPAA, withdrawal from the plan would not have resulted in any liability for Gray. Before the MPPAA, employers who withdrew might become liable later, but only if the plan terminated within five years, and then only in an amount up to 30 percent of their net worth. 29 U.S.C. §§ 1362, 1364 (1976). Certain employer participants, defined by ERISA as "substantial employers," could be required at the time of withdrawal to post security against the possibility of such future liability, but that provision did not apply to Gray. 29 U.S.C. § 1363 (1976); Ex. B to Affidavit of Thomas M. Triplett, filed April 7, 1982, p. 61.

At the time of Gray's withdrawal from its plan, there was no reason at all to believe that the plan might terminate within five years. It was actuarially sound at the time and its position had been improving in recent years.¹⁹ Its actuarial position was, moreover, based on assumptions which would probably be overly

¹⁹ Ex. A to Affidavit of Thomas M. Triplett, filed April 7, 1982, p. 16; *id.*, Ex. B, p. 75. On April 29, 1983 Gray filed with the United States Court of Appeals for the Ninth Circuit a Motion for Permission to Supplement the Record or, in the Alternative, for Temporary Remand for Consideration of Additional Evidence. That motion was supported by an affidavit by Gray's counsel, with accompanying exhibits, showing that on April 19, 1983 attorneys for the Trust had informed him that as of that date the plan from which Gray had withdrawn no longer had any unfunded vested liability. The Ninth Circuit issued its decision in Gray's favor on May 20, 1983 without having ruled on that motion. It was subsequently denied by order dated June 27, 1983.

conservative in the event of actual termination.²⁰

The change in employer liability made by the MPPAA was profound. Instead of a merely theoretical possibility of a future limited liability to PBGC, the consequences which the law attached to Gray's withdrawal at the time it occurred, MPPAA imposed after the fact an absolute liability to the pension fund without regard to Gray's ability to pay. The amount assessed by the plan's trustees was \$201,359, an amount nearly equal to Gray's pension contributions during the prior five years under a collective bargaining agreement in spite of the plan provision which limited its liability to those payments alone. (J.A. 14).

There is no question that the retroactive application of MPPAA to Gray

²⁰Ex. B to Affidavit of Thomas M. Triplett, filed April 7, 1982, p. 75.

worked a substantial unanticipated change, to Gray's detriment, in the consequences of Gray's completed business decisions and transactions.

2. The New Liability Which Has Been Retroactively Imposed Is Not Based On Actual Harm Caused Or Costs Generated In The Past.²¹

It has been argued that the withdrawal liability imposed by MPPAA can be justified by the need to assure employers that if they join an existing multiemployer plan they will not be inheriting vast liabilities created by others, and to insure that withdrawing employers actually contribute to the funding of obligations they helped to create. In fact, however, employers did not create the obligations for which they are assessed under MPPAA.

²¹ See, e.g., *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 19, quoted at p. 28, *supra*.

Unfunded vested liability can result from factors which are not attributable to the activities of any employer. The plan's benefit levels are set by its trustees, whose duty is to the plan's beneficiaries, not to its contributing employers. ERISA itself, by imposing new unbargained-for vesting requirements, increased the unfunded vested liability of many plans. A plan's trustees may have provided benefit credits to employees for past service for which no contributions at all were received. The actuarial assumptions which result in the calculation of unfunded vested liability may be revised. The plan's assets can be affected by the trustees' investment decisions or by general economic fluctuations. See *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 632 n. 1 (4th Cir. 1983).

Because a multiemployer plan is specifically designed to accommodate changes in employer participants, it may well be "impossible to trace the unfunded liability attributable to each employer." 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (remarks of Sen. Dole). And MPPAA does not correlate a plan's unfunded vested liability with burdens attributable to, or the liability imposed on, an employer who withdraws.

To take one example, the MPPAA statutory formulas base an employer's withdrawal liability on its contributions during the five years prior to withdrawal. 29 U.S.C. § 1391 (Supp. V 1981). However, an employee's right to benefits need not vest until he has completed ten years of service. 29 U.S.C. § 1053 (1976). Withdrawal by an employer who has contributed to a plan for less than ten years can thus provide the plan with a

substantial windfall based on contributions alone. Since its employees' rights have not vested, the plan has incurred no liability to them and has inherited the employer's contributions free of obligation. When such an employer withdraws from the plan, it will be required to contribute an additional windfall in the form of a withdrawal liability.

Moreover, although withdrawal liability is calculated by formulas based on a plan's unfunded vested liabilities and is assessed because of the possibility that a plan may terminate with such unfunded liabilities and thus be unable to pay promised benefits, MPPAA contains no requirement that withdrawal liability payments actually be used to reduce the plan's unfunded vested liability. There is a substantial likelihood that they will not.

As fiduciaries, plan trustees have a duty to preserve the financial security of the fund; they also have a duty to apply the assets of the fund for the benefit of the employees to the greatest extent possible. *Adams v. N.J. Brewery Emp. Pen. Trust Fund, Etc.*, 670 F.2d 387, 397, *reh. denied* (3d Cir. 1982). Because those two duties may conflict, the trustees have a broad discretion to act. *Id.* In doing so, however, they must act *solely* on behalf of the beneficiaries. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 *reh. denied* (1981). Their duty to the plan's beneficiaries "must overcome any loyalty to the interest" of the parties who appointed them. *Id.*

MPPAA requires that withdrawal liability be assessed whether or not the plan needs the funds to remain actuarially sound. If a plan is financially healthy, it would be perfectly consistent with the trustees' fiduciary duties to apply

withdrawal liability payments to providing greater benefits rather than to reducing the level of unfunded liability. The trustees' fiduciary duty to act solely in the interest of the beneficiaries may even require them to do just that.

MPPAA, in other words, requires additional contributions to multiemployer plans from employers who have already contributed the amounts they had bargained for, and does so whether or not there is a relationship between those employers' activities and a danger that the plan's beneficiaries would otherwise not receive their pensions. Indeed, it requires those contributions whether or not that danger exists at all.

3. The Beneficiaries Of The Change
In The Law Had No Legitimate
Expectations Which The Old Law
Failed To Meet.²²

Although employer contributions to multiemployer plans are determined by collective bargaining agreements, vesting requirements and benefit levels are not. Vesting requirements have been governed by ERISA since 1976. 29 U.S.C. § 1061(b) (1976). Benefit levels are determined by the plan's trustees, and do not depend on

²²*Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. 246, n. 18:

" . . . Here, the company had relied upon the funding obligation of the pension plan for more than a decade. There was no showing of reliance to the contrary by its employees. Indeed, Minnesota did not act to protect any employee reliance interest demonstrated on the record. Instead it compelled the employer to exceed bargained-for expectations and nullified an express term of the pension plan."

the contribution rates of individual employers. It is the plan, not the employer, which has promised to pay a defined level of benefits. Although employees have a right to rely on an employer's collectively-bargained promise to make the agreed contributions, they have no legitimate right to rely on the employer to fund benefits promised by someone else.

The Ninth Circuit's analysis of the situation in this case is both succinct and entirely correct:

"Employees expecting benefits under their multiemployer plans have an interest in the financial health of their plans. Their interest, however, goes more toward the solvency of the multiemployer plan as a whole than toward the individual contributions of a single employer, and this does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability. There is no reason to believe that employees significantly relied for the financial health of the multiemployer plans on the increased termination liability imposed by the Amendments Act on

those employers who withdrew between the effective date of the Act and the date of enactment. . . ." J.S. 19a-20a.

The Ninth Circuit's analysis of the employees' expectations applies with at least equal force to the plan's trustees. Just as Gray could not have known until the MPPAA was enacted that it would face any withdrawal liability, or the extent of that liability, so the plan's trustees could not have reasonably anticipated that the plan would receive additional payments from withdrawing employers who had made their agreed-upon contributions. The trustees' legitimate expectations, like those of the employees, were defined by the applicable collective bargaining agreements and by the pre-amendment provisions of ERISA which provided for employer liability to PBGC only in the event the plan terminated.

From the record in this case it appears that the trustees of Gray's plan were conducting its affairs on the basis of

those legitimate expectations. During the period covered by that record, the plan was actuarially sound without provision for withdrawal liability, and its financial health has steadily improved.

With respect to the expectations of other contributing employers (see PBGC Br. 33, n. 29), the situation is the same. Other employer participants in the plan, which limited each employer's liability to the contributions required by the collective bargaining agreement, must have been aware of the premises on which the plan was based:

" . . . The multiemployer character of the fund permits employees to accumulate pension credits even while shifting employment from one employer to another, and protects their pension rights from being lost by the 'withdrawal' of any particular employer. The multiemployer character of the fund also protects the solvency of the fund because the impact on the fund from the 'withdrawal' of any particular employer is minimized; and when new entrants take the place of withdrawing

employers, the pool is replenished." *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 632, n. 1 (4th Cir. 1983).

Retroactive application of the MPPAA's withdrawal liability provisions would not disappoint the legitimate expectations of any party.

4. The Asserted Special Interest In Having The New Law Operate Retroactively Is Not Adequate.²³

PBGC would justify the retroactive effective date for the withdrawal liability provisions of the MPPAA by a perceived need to deter "opportunistic" employers from withdrawing from multiemployer plans while Congress was debating whether to enact new

²³ See, e.g., *Lichter v. United States*, 334 U.S. 742 (1948) (Congress's exercise of war power during national emergency); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977) (retroactive repeal of statutory covenant could be sustained only if resulting impairment of contract "was both reasonable and necessary to serve the admittedly important purposes claimed by the State").

legislation (see PEGC Br. 21, 29, 30-31, 33). The underlying assumptions are that withdrawal is a matter within the employer's control and that unless deterred a significant number of employers would have promptly and deliberately withdrawn to avoid the possibility of withdrawal liability. However, neither the fact nor the timing of withdrawal is in the employer's hands alone.

Withdrawal from a multiemployer plan occurs when an employer ceases to have an obligation to contribute under the plan. 29 U.S.C. § 1383 (Supp. V 1981). An obligation to contribute can exist only by virtue of a collective bargaining agreement. 29 U.S.C. § 1301(a)(3)(B) (Supp. V 1981). The employer cannot renew such an agreement if the union no longer represents a majority of its employees. See, e.g., 29 U.S.C. §§ 159(c)(1)(A)(ii), 159(c)(1)(B) (1976); *International Ladies'*

Garment Wkrs. U. v. N.L.R.B., 366 U.S. 731 (1961) (good faith belief that union represents a majority will not suffice); *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665 (2d Cir. 1970); *United States Gypsum Co.*, 157 N.L.R.B. 652, 61 L.R.R.M. 1384 (1966). Thus action by employees, against the employer's wishes, can cause a withdrawal from the plan. An employer cannot interfere without committing an unfair labor practice. 29 U.S.C. § 158(a) (1976).

Threats of liability aimed at the employer cannot prevent such a withdrawal. Aided by the enactment of MPPAA, a union can threaten to abandon representation rather than enter a renewal collective bargaining agreement. If that threat is carried out, the employer will have been

forced into a withdrawal, and will be subjected to withdrawal liability.²⁴

Withdrawal, moreover, does not happen overnight. Collective bargaining agreements usually require substantial advance notice of either party's intention not to renew and, if neither the employer nor the union gives such notice, the agreement (and the obligation) continue in existence for another contract period.

Typically, collective bargaining agreements have a term of three years. An employer who was inclined to be "opportunistic" could not have withdrawn from a plan by terminating such a collective bargaining agreement when passage of the MPPAA seemed likely unless,

²⁴The threat itself is a new weapon placed in labor's hands by MPPAA. It can be used during bargaining to exact concessions from employers who would be faced with large withdrawal liabilities if negotiations reach an impasse.

by chance, that had happened to be near the end of a three-year contract period.

Moreover, termination of the agreement does not, of itself, accomplish a withdrawal. The employer remains obligated to contribute to the pension plan unless and until the union loses majority status (see p. 50, *supra*) or negotiations for a new contract (which the employer must conduct in good faith) have reached an impasse. See, e.g., *Hinson v. N.L.R.B.*, 428 F.2d 133 (8th Cir. 1970).

In Gray's case the agreement required 60 days' written notice (J.A. 16). Gray gave that notice on February 14, 1980 (J.A. 19). From that date forward, Gray was committed to either reaching agreement with the union on a new collective bargaining agreement or withdrawing from the pension plan. On that date the proposed MPPAA had not even been reported

out of a Congressional committee. See 1980 U.S. Code Cong. & Ad. News 2918.

Gray's experience does not appear to be unusual. Other employers have also been trapped by the retroactive application of withdrawal liability. In the cases heard and decided with this one, the Ninth Circuit's opinion discloses that Shelter Framing's collective bargaining agreement expired on July 1, 1980 and it was not able to reach a new agreement with its employees' union, and that G & R Roofing's withdrawal was the result of a similar sequence of events (J.S. 6a, 7a). In *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628 (4th Cir. 1983), it appears from the court's opinion that the employer's withdrawal resulted from a termination of operations as a consequence of protracted operating losses. 718 F.2d at 632-33.

In *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 83-C-5315 (N.D. Ill., Nov. 23, 1983), appeal docketed, No. 83-3298 (7th Cir., Dec. 23, 1983), a retroactive withdrawal liability was assessed against an employer which, in a collective bargaining agreement executed in November of 1978, had agreed with its employees that, as of August 1, 1980, it would cease contributing to its multiemployer plan and would instead provide its own pension program. Its commitment to withdraw from the multiemployer plan was irrevocable long before the introduction in Congress of the bill which became the MPPAA. In *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982), appeal docketed, No. 82-3634 (9th Cir., Nov. 18, 1982), withdrawal occurred by virtue of expiration

of a collective bargaining agreement during the retroactive period after the employees had attempted to decertify the union and under circumstances which prompted the union to disclaim any interest in representing them.

These are hardly the actions of employers who, seeing the handwriting on the wall when it appeared likely that the full Congress soon would be acting on the MPPAA, leaped at the chance to escape potential new obligations. Rather, they are the actions of entities which, while going about their business and attempting to deal with the conditions confronting their enterprises, were caught by the happenstance of the dates of Congressional action and by Congress's general desire to

deter pre-enactment conduct which could not reasonably be deterred.²⁵

Any proposed legislation which would create a new burden or liability may encourage some persons, whether through "opportunism" or prudence, to rearrange their affairs so as to escape the new burden should it actually come into being. If the desire to prevent such rearrangements were held sufficient to justify making the liability retroactive, Congress would have the power to freeze the status quo by the mere introduction of legislation. Every bill could contain a provision that if it were enacted its substantive changes would operate as of the

²⁵ In fact, the February 27, 1979 retroactive effective date, as proposed in the original bill, was abandoned very late in the legislative process in order to exempt from withdrawal liability a number of employers "who were caught by the earlier date." 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (remarks of Sen. Javits).

date of the bill's introduction (or any other date chosen by Congress during the pre-enactment process). Legislation itself could proceed at leisure while citizens would be forced, at their peril, to conduct their affairs based on predictions as to the outcome of the legislative process at some unknown time in the future.

CONCLUSION

The withdrawal liability provisions of the MPPAA require employers to pay large sums of money to pension plans which have already received from those employers all of the contributions which they were required by law and contract to make. The new law imposes those substantial payments whether or not the pension plans need the funds to protect the rights of their beneficiaries and whether or not the employers' activities have been the cause of any need which may exist. Employers must pay those additional sums even though doing so may destroy their operations and put them out of business.

When Congress required those payments not only from employers who withdrew from their plans after the law's enactment but also from employers who had already done so before the law was passed, it cannot be argued that the burden it imposed was

anything but harsh. The question for the Court is whether Congress was justified in imposing that harsh burden without advance notice and an opportunity to plan for or conform to the law's new standards.

As shown above, the proposed justification for applying the law's new requirements to past conduct is totally inadequate. Without an adequate justification, the retroactive imposition of such substantial liabilities is not only harsh but, because it unreasonably deprives the employers of their constitutional right to notice of the requirements of new legislation, is unduly oppressive.

This Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit, holding that the retroactive application of the MPPAA violated Gray's right to due process of law.

However, in the event that it does not affirm that decision, the Court should

remand the case to the Ninth Circuit for consideration of other issues which that court did not find it necessary to reach.

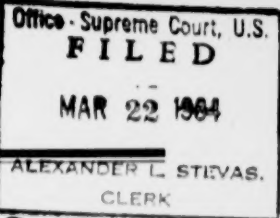
Respectfully submitted,

By _____
Thomas M. Triplett
Counsel of Record

Mildred J. Carmack
Schwabe, Williamson, Wyatt,
Moore & Roberts
of Counsel

January 11, 1984

Nos. 83-245, 83-291



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**REPLY BRIEF FOR APPELLANT
PENSION BENEFIT GUARANTY CORPORATION**

HENRY ROSE
General Counsel

BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
*Deputy Assistant General
Counsel*

Of Counsel:

NATHAN LEWIN
SETH P. WAXMAN

MILLER, CASSIDY,

LARROCA & LEWIN

2555 M Street, N.W.

Suite 500

Washington, D.C. 20037

(202) 293-6400

TERENCE G. CRAIG

DAVID F. POWER

Attorneys

PENSION BENEFIT GUARANTY
CORPORATION

2020 K Street, N.W.

Washington, D.C. 20006

(202) 254-4864

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-245, 83-291

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**REPLY BRIEF FOR APPELLANT
PENSION BENEFIT GUARANTY CORPORATION**

A single issue is presented by this appeal—whether Congress acted constitutionally, within the Due Process Clause, in making the withdrawal liability provisions of the Multiemployer Act effective five months prior to the law's enactment.

Gray and its supporting *amici* argue that withdrawal liability that was retroactive—even for only five months—did not satisfy due process standards because it imposed obligations exceeding contractual limits. This untenable argument, as well as others advanced by Gray and the *amici*, relates not only to the five-month retroactive application of the Multiemployer Act, but also to the *per se* constitutionality of withdrawal liability. In this brief we address first the arguments pertaining to retroactivity—

which is the only issue squarely before the Court. We then discuss briefly the various general attacks on withdrawal liability. The Multiemployer Act, we submit, satisfies any arguably applicable due process standard.¹

THE FIVE-MONTH RETROACTIVITY OF THE MULTIEMPLOYER ACT IS CONSTITUTIONAL

A. Constitutionality Depends on Whether Retroactivity Is Rational

Under *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), a separate, identifiable basis in reason must support a law's application as of a date that precedes its formal enactment: "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." 428 U.S. at 17. According to Gray and various *amici*, "[r]ationality" is not the touchstone" (Gray Br. 13), retroactive legislation can be supported only by "a special and particularized showing of justification" (Gray Br. 31), and it must meet "a higher burden of fairness and demonstrated public need" (Transport Motor Express ("TMX") Br. 11).²

¹ In addition to the decisions cited in our opening brief (p. 17 n.18), the Seventh Circuit has recently upheld the Multiemployer Act as applied to all withdrawals in *Peick v. PBGC*, 724 F.2d 1247 (7th Cir. 1983) ("*Peick*"), the Second Circuit has upheld the Act's application to pre-enactment withdrawals in *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 5 Emp. Ben. Cases ("EBC") 1001 (2d Cir. 1984) ("*Textile Workers*"), and the United States District Court for the District of Columbia has upheld the Act's application to post-enactment withdrawals in *Dorn's Transportation, Inc. v. IAM National Pension Fund, Benefit Plan A*, C.A. No. 82-1141 (D.D.C., Jan. 19, 1984) ("*Dorn's*").

² Gray's threshold argument appears to be that, except for income tax legislation, Congress is constitutionally proscribed from enacting any retroactive effective dates, regardless of their particularized justification: "Congress has no power to require citizens to conform their conduct to standards contained in a bill which may or may not become law." (Gray Br. 17-18) (emphasis in original). This categorical proposition (from which appellee quickly recedes (Gray Br. 24-31)) is plainly untrue in light of this Court's deferral

However, as the Seventh Circuit noted in *Peick* (724 F.2d at 1266) :

In *Turner Elkhorn Mining*, the Court in no way indicated some special distaste for retroactive legislation, but merely stated that not only must legislation as a whole be rational and non-arbitrary but also that any retroactive aspects of the legislation must, in particular, be rationally and non-arbitrarily related to legislative goals.

Turner Elkhorn thus establishes that if such a rational policy justifies retroactivity, no more "particularized" or "higher" burden need be met.³

B. Congress Rationally Concluded that Employers Were "Forewarned of the Possibility" of Statutory Liability

Were it true, as Gray and its *amici* assert, that retroactive withdrawal liability was totally new and unexpected, its constitutionality might be debatable. The fact is, however, that multiemployer termination liability had been a feature of federal pension law since 1974. The withdrawal liability provisions ultimately adopted in the Multiemployer Act were introduced in 1979. As the Second Circuit found in *Textile Workers*, 5 EBC at 1009, during the pre-enactment period "[n]otice was everywhere." And as the Seventh Circuit explained in *Peick*, 724 F.2d at 1269 (footnote omitted) :

to the wisdom of Congress in making laws retroactive in order to assure their effectiveness. See PBGC Br. 32-33 and nn.27, 29.

³ The test enunciated in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980) ("*Nachman*"), is urged by various *amici*. The *Nachman* test, however, is an application of Contract Clause principles, which the Seventh Circuit itself has acknowledged are inapplicable to challenges to the Multiemployer Act. *Peick*, 724 F.2d at 1263, 1270.

Assuming the applicability of the *Nachman* analysis, we rely on *Peick*, 724 F.2d at 1270-74; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 638-39 (4th Cir. 1983), *petition for cert. pending*, No. 83-541 ("*Republic*") ; and *Textile Workers*, 5 EBC at 1007-1010.

[T]he intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process [E]mployers who withdrew during [the retrospective] period cannot argue that they are now being required to pay wholly unanticipated liabilities.

Indeed, the pervasiveness of this notice is precisely what necessitated retroactive liability. The extensive public awareness of the impending law and the ability to undermine the law's purposes during protracted legislative debate underscore the rationality of Congress' retroactive effective date. See PBGC Br. 39 n.36.⁴

Neither Gray nor, with one possible exception, any of its *amici* who represent hundreds of thousands of employers, claim that they were in fact unaware of the legislative progress of the Multiemployer Act.⁵ Instead, Gray argues abstractly that until a president signs a law, even those who are already extensively regulated are constitutionally entitled to ignore that regulatory environment as well as the comprehensive legislative process culminating in the law's enactment. That argument disregards common experience and common sense, and would make any form of retroactivity automatically unconstitutional.

Many of the briefs opposing our position rely on this Court's holding in *Untermeyer v. Anderson*, 276 U.S. 440 (1928), as support for the proposition that "until the legislative process is complete there is no law and individuals cannot be held to standards which do not yet exist." Gray Br. 18-19. However, this Court clearly explained in

⁴ Cf. *Is Your Pension Safe From Company Shenanigans?*, U.S. News & World Report 73, 74 (Feb. 6, 1984) ("just the threat of [legislation regulating pension plan terminations] may be enough to accelerate the pace of terminations as companies rush to claim extra millions of dollars while they can."). Appendix to this Reply Brief ("R. App.") 1a.

⁵ *Amicus* Republic implies that it was unaware of the legislative events leading to the enactment of the Act, Br. 17-18. None of the district courts and courts of appeals in which Republic has pressed its case has adopted, much less relied upon, such a finding.

Welch v. Henry, 305 U.S. 134, 147 (1938), which upheld retroactive imposition of an income tax, that the decision in *Untermeyer* principally turned on the absence of any warning that a gift tax would be imposed. The Court noted that “[e]ven a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy.” *Id.* (citing *Milliken v. United States*, 283 U.S. 15 (1931)).

Far from supporting Gray, these cases demonstrate why retroactive application of the Multiemployer Act was entirely valid. Multiemployer plans had been regulated and subject to termination liability since passage of ERISA. While the precise form of withdrawal liability had not existed before, employers had been “forewarned by the statute books of the possibility of such a levy.”

C. Retroactive Withdrawal Liability Is a Rational Response to a Legitimate Legislative Concern

Gray and its *amici* have argued that retroactive withdrawal liability was not necessary because collective bargaining agreements limited employer withdrawals from multiemployer plans. Even assuming such a limitation, it does not follow that the Act’s application to pre-enactment withdrawals was irrational. Congress considered the PBGC’s legislative recommendations and other versions of the Multiemployer Act for over one and one-half years—more than half the period of a typical collective bargaining agreement. Gray Br. 52. Congress could reasonably have believed that many collective bargaining agreements would expire during the extended legislative process. Accordingly, from the outset, Congress was urged to make the Multiemployer Act retroactive.⁶ Indeed, the possibility that a substantial number of employers could

⁶ *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess.* (1980) 385 (Bert Seidman, Department of Social Security, AFL-CIO), 388 (Don Seifman, Counsel, Retail Clerks International Union).

withdraw during the five-month retroactive period ultimately provided by law was hardly illusory. Construction industry bargaining agreements, for instance, are frequently negotiated during the spring, *see* 1289 BNA Construction Labor Rep. A-13 (Aug. 6, 1980) (R. App. 5a-6a), and the Carpenters Master Labor Agreement, pursuant to which Gray and many other employers contributed to the Trust Fund, expired on May 31, 1980 (Joint Appendix ("J. App.") 13, 17), during the very retroactive period at issue in this case. Withdrawal by the signatories to that agreement could have substantially harmed the Fund. Furthermore, withdrawals may result from sales of businesses, liquidations, relocations outside the jurisdiction of a plan, and various other events that are not subject to the constraints of collective bargaining.⁷

To be sure, retroactive withdrawal liability may sometimes result in hardship. But isolated hardships result from *any* economic legislation, whether or not retroactive. They are an inevitable consequence of "legislative acts adjusting the burdens and benefits of economic life." *Turner Elkhorn*, 428 U.S. at 15. The issue is not whether such hardships exist but whether Congress had a reasonable basis for believing that, absent retroactivity, employers would withdraw prematurely in order to avoid withdrawal liability.⁸ Plainly Congress

⁷ It is well established that the sale of a business need not effect a transfer of all of the seller's obligations under a collective bargaining agreement. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 257 (1974). Similarly, in the construction industry, many employers adopt "pre-hire" agreements that they may abrogate at will. *Jim McNeff, Inc. v. Todd*, 103 S. Ct. 1753, 1758-59 (1983). This Court's recent holding in *NLRB v. Bildisco & Bildisco*, 52 U.S.L.W. 4270 (Feb. 22, 1984), further illustrates that an employer's collective bargaining agreement is not an economic straitjacket.

⁸ Congress, of course, is the appropriate forum for any reconsideration of the reasons for retroactivity. For example, Senator Nickles and Representative Erlenborn have introduced bills that provide, *inter alia*, for the elimination of retroactive withdrawal

did.⁹

Gray also argues that even if Congress was empowered to give the Multiemployer Act retroactive effect, the effective date it chose was arbitrary. However, it is clear that every law must have *some* effective date, and April 29, 1980, was a rational choice.¹⁰ Congress initially considered an effective date coinciding with submission of the PBGC's legislative proposal. After a year of legislative consideration, Congress concluded that the prospect of retroactive application had partially achieved its objective, and it determined to advance the Act's effective date to avoid imposing liability on those employers who had been committed to withdrawal prior to the Act's introduction. See PBGC Br. 12. This was a rational and proper course. It is not rendered invalid by the assertion that "politically powerful" employers were responsible for the change in effective date. The legislative record does not support the proposition that Congress simply succumbed to blandishments and entreaties by the "politically powerful." Nor should this Court ignore the fact that the National Association of Manufacturers and the U.S. Chamber of Commerce, along with large corporations such as United Technologies Corporation (*see infra*, page 17, note 22), have filed *amicus curiae* briefs supporting the appellee and made their voices heard in the Congress. 126 Cong. Rec. S10100 (daily ed. July 29, 1980) (Sen. Javits).¹¹ If

liability. 128 Cong. Rec. H706, E457-58 (daily ed. Feb. 9, 1984); *id.* S1497, S1515-16 (daily ed. Feb. 22, 1984).

⁹ Gray and various *amici* go beyond arguing that retroactivity is unconstitutional and suggest that withdrawal liability could be constitutionally imposed only if Congress provided a "grace period." Gray Br. 20-21. No case has ever held or intimated, however, that a grace period is required to preserve the constitutionality of any legislation. And in this case, such a period would only have exacerbated the very problem—opportunistic withdrawals—that Congress reasonably sought to correct. *Peick*, 724 F.2d at 1269.

¹⁰ The selection of any particular retroactive date is clearly not unconstitutionally arbitrary. *Cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 86 (1978) ("arbitrary" liability limitation not unconstitutional).

¹¹ Indeed, contrary to the position they take in this Court, both the NAM and the Chamber supported a House rule whose purpose

the exercise of "political power" invalidated resulting legislation, few federal laws could survive constitutional challenge.

Once it was determined in April 1980 to amend the effective date initially proposed in the bill, Congress plainly could not have prescribed an effective date *after* April 1980. Had it done so, the public announcement of a future effective date would have encouraged the very conduct the retroactive date was designed to discourage. Congress could only have set a new date *prior* to April 1980 or coincident with the date on which the amendment was announced. On April 29, 1980, Senator Bentsen notified the Senate that the withdrawal liability provisions adopted by the Senate Finance Committee would apply to any withdrawals occurring on or after that date. 126 Cong. Rec. S4302-03 (daily ed.). As the district court in *Peick* stated, "the very care Congress exercised in picking [the Multiemployer Act's] effective date bolsters the case in favor of the statute." 539 F. Supp. 1025, 1055-56.

Gray suggests that the many tax cases which have upheld retroactive legislation are *sui generis* because tax laws merely allocate to taxpayers a particular share of government's expenses for the general welfare. The Fourth Circuit rejected this argument. *Republic*, 718 F.2d at 638. Moreover, the tax law rationale applies *a fortiori* to the instant case. Gray has been allocated a share of the cost of fulfilling pension obligations to the Fund's participants, including Gray's own former employees.¹² If Congress may retroactively reallocate the

was to facilitate the passage of the Multiemployer Act. 126 Cong. Rec. H7864 (daily ed. Aug. 26, 1980) (Rep. Thompson). See also 284 BNA Pension Rep. A-22 (Mar. 21, 1980) (R. App. 1a-2a).

¹² Gray's reliance on *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) ("*Alton*"), is misplaced. *Alton* was based upon assumptions which are now invalid. The Court in *Alton* treated railroad safety and efficiency as the only permissible legislative ends, implicitly rejecting any notion that employee retirement income security is a valid legislative concern. That premise is

general costs of government, it may certainly reallocate the costs of funding specific pension commitments from which employers like Gray have benefitted.

One *amicus* urges that this Court's recent decisions in *Arizona Governing Committee v. Norris*, 103 S. Ct. 3492 (1983), and *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), which dealt with whether this Court's decisions on a question of statutory construction should be given retroactive effect, govern the issue presented in this case. TMX Br. 11-12. Those cases related, however, to an issue on which there was no clear legislative mandate, *Manhart*, 435 U.S. at 721, and the Court determined that wholly unexpected, devastating results were not mandated by the substantive decision rendered in *Manhart*. In this case, by contrast, the legislative intent to make withdrawal liability briefly retroactive could not have been clearer; it was clearly presaged during the legislative process and explicitly prescribed in the law. The rationale of the above decisions does not control the wholly distinguishable situation where Congress has explicitly adopted a retroactive effective date.

Finally, Gray and some *amici* contend that, contrary to the Second, Fourth, and Seventh Circuits' understanding of *Turner Elkhorn* as supporting the constitutionality of retroactive withdrawal liability, the *Turner Elkhorn* case is distinguishable. There is a constitutional difference, these parties assert, between statutes that are merely retroactive "in effect" and those that are retroactive "in application." The Black Lung Act is said to fall into the former category because it imposes present consequences based on conditions that antedated the law, but that were

plainly no longer true, as ERISA itself demonstrates. The court in *Dorn's* noted (slip op. at 13-13):

A worker's pension is understood today as a form of deferred compensation and not as a gratuity. The underpinnings of [Alton] have thus been so altered as to obsolete its principle that protection of pensions is not a legitimate end *per se*.

medically identified after the law was formally enacted. The Multiemployer Act is said to be different because the formal act that produces liability—the withdrawal from a multiemployer plan—occurred before enactment of the law.

That purported difference does not, however, affect the constitutionality of the law: in both cases, an employer is subject to liability for which it allegedly had no opportunity to prepare.¹³ Another similar law, not heretofore discussed, has withstood constitutional challenges in several circuits—the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. §§ 902-950. Amendments to the LHWCA required employers to pay death benefits to the widows of certain injured former employees, even where the cause of death was unrelated to the injury and where the employment relationship had ceased prior to the enactment of the law. *Id.* § 909; see, e.g., *St. Louis Ship Building and Steel Co. v. Casteel*, 583 F.2d 876 (8th Cir. 1978); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 379 (4th Cir. 1976). Thus, the Black Lung Act, the amendments to the LHWCA, and the Multiemployer Act all require employers, on the basis of pre-enactment events, to pay liabilities not specifically required by their contracts.

Gray urges that because employer liability is not fixed under the Black Lung Act until the occurrence of post-enactment events, that law was entitled to, and benefitted from, a more deferential constitutional scrutiny than is appropriate to the Multiemployer Act. However, the basis for Gray's constitutional argument is its asserted right to rely on existing law in making business decisions, and this distinction is irrelevant to such reliance. The employers involved in *Turner Elkhorn* and in the LHWCA cases relied on their contracts and on pre-enactment law in making decisions regarding their workplaces. Subsequent leg-

¹³ See Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 California Law Review 216, 220 (1960).

isolation altered the consequences of those decisions, subjecting the employers to liability based on completed relationships and on events beyond the employers' control—a not-yet-identified pneumoconiosis or an employee's post-enactment death while married could precipitate employer liability. Nonetheless, the laws were upheld as reasonable exercises of congressional power. The Multiemployer Act should be upheld on the same basis.¹⁴

¹⁴ Gray erroneously attaches constitutional significance to other asserted distinctions between this case and *Turner Elkhorn*. Gray emphasizes the government's role in initial funding of black lung benefits. Gray Br. 27. However, the Court made clear that its decision in *Turner Elkhorn* did not turn on the government's participation in the program. 428 U.S. at 16 n.14 and at 18.

Gray also urges that "the direct relationship in *Turner Elkhorn* between each employer's liability and the actual injury to its former employees"—a factor purportedly not present in the pension context—"was especially important" to the Court's decision, yet does not exist here. Gray Br. 27-28. The Black Lung Act, however, did not attempt to impose employer liability on the basis of responsibility. It imposed liability only on the most recent employer, even though the disease was the cumulative product of many years' exposure to conditions which might not even prevail in the most recent employer's mines. 20 C.F.R. § 725.493(a)(1)-(a)(4). Similarly, under the LHWCA, "the last employer covered by the Act is wholly liable even though an industrial injury or disease is caused in part by a subsequent employer who is not subject to the Act." *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1292 (9th Cir. 1983) (illness creating entitlement discovered 32 years after discharge by liable employer).

Moreover, *Turner Elkhorn* specifically disavowed "blameworthiness" as a basis for its decision. 428 U.S. at 17-18. In any event, the withdrawing employer in this case knowingly benefitted from labor obtained in part by the commitment to provide retirement benefits, just as the employer in *Turner Elkhorn* benefitted from the labor of its miners. Congress has reasonably decided, as it did in *Turner Elkhorn*, to make the Fund's employers responsible for its participants' pensions, as an "actual, measurable cost" of doing business. 428 U.S. at 19.

D. Imposing Withdrawal Liability on Employers Withdrawing From a Multiemployer Plan is Constitutional.

The employers have, in addition, advanced a number of arguments relating not to the issue of retroactivity but to the constitutionality of withdrawal liability *per se*. They contend that such liability is irrational, inequitable, and violative of the Takings Clause. The court below never reached any of these issues, which have, however, been rejected by *all* of the many lower courts that have considered them.

1. *Rationality*.—There is no merit to any of the four arguments made to prove that withdrawal liability is irrational. The employers first contend that withdrawal liability was unnecessary. Gray Br. 2 n.1. Congress, however, found that the loss of contributions from withdrawing employers frequently imposes increased obligations on remaining employers, and that where the industry supporting the plan enters a decline, the plan's financial base may be jeopardized. 29 U.S.C. § 1001a(a)(4) (Supp. V 1981). As the Seventh Circuit concluded in *Peick*, 724 F.2d at 1268, Congress acted rationally to avert this danger:

Congress has no obligation to wait until a potential problem matures into an actual crisis before enacting corrective legislation addressing the problem. Congress acted rationally in choosing to try to forestall future pension crises involving millions of workers by essentially forcing withdrawing employers to fully fund future pension liabilities.

Second, Gray argues that retroactive withdrawal liability is irrational when imposed on "involuntary" withdrawals.¹⁵ Gray Br. 33. In any event, in view of the myriad forces that may encourage or deter decisions to

¹⁵ *Amicus* Chamber of Commerce, on the other hand, suggests that Congress should have distinguished between "illegitimate" and "good faith" withdrawals. Chamber Br. 21. The conflicting and indefinite "legislative programs" suggested to this Court emphasize that these issues are properly resolved by the Congress and not by the courts. See PBGC Br. 23 n.19.

withdraw, Congress cannot reasonably be required to fashion legislation that meticulously defines "voluntary" and "involuntary" withdrawals and assesses liability for only the former.¹⁶ Moreover, even where an employer's withdrawal might be deemed "involuntary," a congressional decision not to assess withdrawal liability would transfer that employer's share of the plan's obligations to other employers. As one district court observed:

From the perspective of the remaining employers in the plan and of the employees who expect to receive benefits from the plan, the voluntariness of one employer's withdrawal is irrelevant. What they are concerned with is there being sufficient funds to meet the obligations of the plan.

Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp. 523, 526 (W.D. Wash. 1982).

Third, Gray suggests that when a withdrawn employer has contributed to a plan for only a brief period, its employees may have earned few, if any, pension entitlements, and thus the assessment of withdrawal liability against such an employer is irrational.¹⁷ However, the fact that an employer's own employees do not vest under a plan while that employer is contributing does not mean that they will not vest later and earn benefits that are based in part on their service to the withdrawn employer. Indeed, it is in the very nature of the construction industry that employees frequently change employers. A basic purpose of multiemployer plans is to permit employees to retain the pension credits they earn with an employer whom they serve only briefly.

¹⁶ Gray suggests that its own withdrawal was "involuntary" because it "was not able to reach a new agreement with its employees' union." Gray Br. 54. There is surely a substantial "voluntary" component in an employer's decision not to agree to terms requested by the union representing its employees.

¹⁷ This argument, of course, does not apply to Gray, which contributed to the Trust Fund for 15 years. Gray Br. 5.

Finally, Gray argues that the existence of unfunded vested benefits does not, in and of itself, indicate a danger to plan benefit security or a need for withdrawal liability. Gray Br. 44. However, as the Seventh Circuit observed (*Peick*, 724 F.2d at 1274), Congress was reasonable not to limit the assessment of withdrawal liability to situations where "the financial circumstances of the plan [are] particularly parlous," because:

termination or disaster, or escape from termination or disaster, is rarely predictable with certainty. And it is not irrational—it is in fact merely financially conservative—to measure financial health by the unfunded vested liability, even though the ultimate life-span of the plan may be unpredictable.

Congress realized that any other test of a plan's "need" for withdrawal liability would have the same critical defect as did liability on termination—it would create an incentive to withdraw before the plan reached the legislatively determined "danger" point, shifting the funding burden to remaining employers.

2. *The Equities*.—Gray and certain *amici* argue that since employers have "no control" over their plans' benefit levels, it is inequitable to impose withdrawal liability. Both the premise and the conclusion of this argument are flawed. Employers do have substantial control over the plans. Not only do they select half of all trustees, thereby making consideration of their interests certain (see *Textile Workers*, 5 EBC at 1009), but they also can control plan benefit levels through collective bargaining.¹⁸ And the plan in *NLRB v. Amax Coal Co.*, 453

¹⁸ The Associated General Contractors of America, the employer association that negotiated the collective bargaining agreement adopted by Gray (J. App. 16), urges that "[c]ontractors involved with plans that are less well-funded should work to improve funding either at the bargaining table or through the plan trustees." Inventory of Construction Industry Multiemployer Pension Plans (February, 1983), p. 6 (R. App. 12a). The AGC notes that "management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding." *Id.* p. 3 (R. App. 12a). Indeed, Senator Dole observed that the

U.S. 322 (1981), upon which Gray relies, itself demonstrates employers' ability to restrict trustee authority over benefit levels through collective bargaining. *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-74 (1982).¹⁹

Moreover, Gray and the other employers have knowingly benefitted from multiemployer funds and have had six years' notice that their obligations to support benefits could exceed their contractual obligations. The Fourth Circuit concluded in *Republic*, 718 F.2d at 639, that this made withdrawal liability equitable:

Congress did not in our view act inequitably in requiring that employers who received the full benefit of their employees' services should bear the cost [of unfunded pension liability] rather than the employees who provided their services on the actual or implied promise that they would ultimately enjoy their vested, accrued pension benefits.

The fact remains that *someone* must bear the burden of shortfalls in multiemployer plans. As the Second Circuit explained (*Textile Workers*, 5 EBC at 1009 (quoting 126 Cong. Rec. 20,234 (1980) (Sen. Matsunaga))):

When Congress was considering the [Multiemployer Act], it had to decide whether the withdrawing employer, remaining employers, or employee participants should bear the burden of any shortfalls in multiemployer plans Certainly, it was not unreasonable for Congress to require the withdrawing employers to bear their burden of funding, rather than to leave the remaining employers "holding the bag."

Multiemployer Act could result in increased direct bargaining over multiemployer plan benefits. 126 Cong. Rec. S10103 (daily ed. July 29, 1980).

¹⁹ Gray suggests that plan trustees may be required by this Court's holding in *Amaz* to use withdrawal liability payments to increase benefits. Gray Br. 43-44. The *Peick* district court carefully considered *Amaz* and specifically rejected this argument. 539 F. Supp. at 1048 & n.48.

Gray also argues that withdrawal liability is imposed "without regard to Gray's ability to pay," and that unlike termination liability under ERISA, it is not limited to 30 percent of Gray's statutory net worth. Gray Br. 36. Gray does not claim that its own liability assessment exceeds 30 percent of its statutory net worth or is unduly harsh or burdensome. Several of the *amici*, however, do. Careful examination reveals that the Act's method of assessment is reasonable, and that the alleged hardships faced by the *amici* may well be illusory.

In considering the Multiemployer Act, Congress was aware that the 30 percent limitation had been an incentive to plan termination under ERISA and could be an even greater incentive to withdrawal under the Multiemployer Act. See PBGC Br. nn. 9, 19. Congress also realized that just as an employer's net worth may not accurately reflect its ability to meet its funding obligations, net worth may also not reflect ability to meet withdrawal liability obligations. PBGC Br. 8 n.9; *see also infra*, page 18, note 22. Thus it altered the means of assessing liability and eliminated the 30 percent limitation.²⁰ However, it provided numerous more carefully crafted provisions that moderate an employer's liability. *See Peick*, 724 F.2d at 1273-74; *Textile Workers*, 5 EBC at 1010.²¹

²⁰ One provision preserves a net worth limitation on the liability of an employer that closes or sells its business. 29 U.S.C. § 1405(a) generally limits the liability of such an employer to a percentage of the value of the business. 29 U.S.C. § 1405(a)(1)(A), (a)(2). The alternative limit in 29 U.S.C. § 1405(a)(1)(B) ordinarily does not increase the limit under section 1405(a)(1), because it is difficult for plans to determine "the unfunded vested benefits attributable to employees of the employer." *See* 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (Sen. Dole). *See* PBGC Opinion Letter 82-8 (Mar. 25, 1982) (R. App. 13a-14a). Of course, the limitation in 29 U.S.C. § 1405 is unnecessary for the construction industry, where the sale or closing of a business does not constitute a withdrawal. 29 U.S.C. § 1383(b)(2)(B).

²¹ The brief of *amicus* TMX states that the Multiemployer Act provides "no meaningful moderation whatever" of "liability for

Moreover, the effect of replacing the 30 percent limitation is substantially less than the *amici* suggest. So far as the PBGC is aware, every employer that has asserted that the liability assessed against it exceeds 30 percent of its net worth has challenged the assessment and reserved the right to reduce the amount through arbitration.²²

pre-enactment withdrawals." TMX Br. 29. However, TMX has stated that its withdrawal liability is limited by Section 4217(a) (2) of ERISA (29 U.S.C. § 1397(a) (2)). Amended Complaint for Declaratory and Injunctive Relief, ¶ 58 (R. App. 7a). The specific purpose of Section 4217 is to reduce the impact of the Multiemployer Act's retroactive application. PBGC Br. 39-40 n.37. Indeed, the application of Section 4217 to TMX may serve not only to reduce the amount of any withdrawal liability owed, but to prevent the occurrence of a withdrawal, and thereby to eliminate liability entirely.

Furthermore, the Act allows an abatement of liability if an employer resumes covered operations after a complete withdrawal or increases its contribution base after a partial withdrawal. 29 U.S.C. §§ 1387, 1388. The court below believed that 29 U.S.C. § 1387 offered no relief to withdrawing employers because the PBGC had not yet issued regulations covering reduction or waiver of their liability should they rejoin their plans. 705 F.2d at 1514, *but see* the PBGC's Proposed Rule, Reduction or Waiver of Complete Withdrawal Liability, 49 Fed. Reg. 8036 (Mar. 6, 1984). However, if Gray had wished to rejoin the Fund, the Act provided for moderation of Gray's liability even in the absence of a regulation. Section 405 of the Multiemployer Act, 94 Stat. 1303, 29 U.S.C. § 1461 note; PBGC Opinion Letter 83-17 (Aug. 1, 1983) (R. App. 8a-9a).

²² *Amici* TMX and E.W. Bohren Transport, for example, state that they or their corporate parent were assessed \$8.6 million in withdrawal liability in connection with their cessation of business as interstate motor carriers. Far from conceding that these assessments are correct, however, TMX and Bohren have asserted statutory defenses that may eliminate their liability entirely. *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 724 F.2d 575, 577-78 (7th Cir. 1983). Moreover, the "employer" in *Transport Motor* for purposes of withdrawal liability is United Technologies Corporation, a billion-dollar conglomerate. See 29 U.S.C. § 1301(b) (1) and TMX Br. 3 n.9. Consequently, any withdrawal liability actually owed would be a

3. *Takings Clause*.—Certain *amici* also argue that the Multiemployer Act raises questions under the Takings Clause. But every court that has considered this claim has correctly held that an employer's asserted contractual right to withdraw from a pension plan without liability is not "property" within the meaning of the Takings Clause. See, e.g., *Peick*, 724 F.2d at 1276; *Republic*, 718 F.2d at 642-43.

CONCLUSION

Congressional enactments requiring improved pension funding are tempting targets for constitutional attack. Because such laws anticipate the needs of the future, their

minuscule portion of net worth and could hardly be described as "crippling". Gray Br. 11.

Similarly, *amicus* G&R Roofing Company asserts that its assessed withdrawal liability of \$687,000 amounts to 40 percent of its "stockholder equity." However, net worth under ERISA is based upon fair market value and may substantially exceed stockholder equity. 29 C.F.R. § 2622.4; see *PBGC v. Ouimet Corp.*, 711 F.2d 1085, 1088 n.8 (1st Cir. 1983), *cert. denied*, 52 U.S.L.W. 3369 (Nov. 7, 1983) (U.S. No. 83-347). Shareholder equity particularly understates fair market value in the construction industry, where firms rely on rented equipment and their book value may be "only a fraction of the amount that would be due under [the Multiemployer Act]." 1289 BNA Construction Labor Rep. A-12 (Aug. 6, 1980) (R. App. 5a). Moreover, G&R has never admitted that the amount assessed against it is correct and has acknowledged in open court that its withdrawal liability could be less than half that amount. Reporter's Transcript of Proceedings in Ninth Circuit at 122-123 (Dec. 7, 1982) (R. App. 15a).

In *Republic*, *amicus* Republic Industries has avoided arbitration while asserting a statutory defense that would eliminate its liability altogether. Opposition of Amicus Curiae PBGC to Petition for Certiorari at 3 n.5. Republic has never acknowledged even having withdrawn from any of the plans that have assessed liability against it, and it admits that if Section 4225 of ERISA (29 U.S.C. § 1405) applies to it, the total withdrawal liability it owes will be only 16 percent of its current assessment. Reply Brief for Appellant in *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, No. 82-1251 (3d Cir., filed August 18, 1982) 13 (R. App. 16a).

benefits may appear remote, while their impact is immediate and painless legislative alternatives are easily asserted. But the legislative process is uniquely suited to the complex task of accommodating present and future economic needs. This Court should defer to Congress' judgment that the Multiemployer Act's retroactive effective date was necessary to achieve the Act's objective of employee retirement security. The Ninth Circuit's contrary decision should be reversed.

Respectfully submitted,

HENRY ROSE

General Counsel

BARUCH A. FELLNER

Associate General Counsel

J. STEPHEN CAFLISCH

Special Counsel

PETER H. GOULD

*Deputy Assistant General
Counsel*

Of Counsel:

NATHAN LEWIN

SETH P. WAXMAN

MILLER, CASSIDY,

LARROCA & LEWIN

2555 M Street, N.W.

Suite 500

Washington, D.C. 20037

(202) 293-6400

TERENCE G. CRAIG

DAVID F. POWER

Attorneys

PENSION BENEFIT GUARANTY
CORPORATION

2020 K Street, N.W.

Washington, D.C. 20006

(202) 254-4864

March 1984

APPENDIX

APPENDIX

U.S. NEWS & WORLD REPORT, PP. 73, 74

February 6, 1984

IS YOUR PENSION SAFE FROM
COMPANY SHENANIGANS?

Employers' maneuvers to strip retirement plans
of surplus cash are drawing fire
from workers and regulators.

Billions of "extra" dollars in company pension plans are becoming tempting targets to corporate managers—and a new source of worry to workers.

More and more companies are tapping overflowing pension coffers to raise investment capital, finance mergers, fend off unwanted takeovers and make their earnings reports fatter.

. . . .

Members of both the House and Senate are working on legislation that would generally prevent managers from raiding pension kitties. Exceptions would be allowed in cases where employers need the money to continue operating and issuing paychecks.

Ironically, though prospects for passage remain dim, just the threat of such a bill may be enough to accelerate the pace of terminations as companies rush to claim extra millions of dollars while they can.

284 BNA PENSION REPORTER A-22 (March 31, 1980)

. . . .

The only other rollcall vote during the markup was over an amendment proposed by Rep. Richard T. Schulze (R-Pa.) which would have put a 3 percent per year reduction on the guarantee for subsidized early retirement benefits.

The amendment was opposed by the coalition of labor and employer groups that support the legislation. [PBGC

Executive Director Robert E.] Nagle indicated that the coalition includes the National Coordinating Committee for Multiemployer Plans, National Construction Employers Conference, Food Marketing Institute, United Food and Commercial Workers, Western Conference of Teamsters, ERISA Industry Committee, National Association of Manufacturers, and others.

Nagle opposed the amendment on the ground that it would create a disparity in guarantees between the single employer and multiemployer programs. The amendment was defeated by a vote of 21-12.

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1289 BNA CONSTRUCTION LABOR REPORTER
A-11-A-13 (August 6, 1980)

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CONGRESS MISSES DEADLINE ON
MULTIEMPLOYER PENSION BILL;
MANDATORY COVERAGE IN EFFECT

Despite several last-ditch efforts to get either the substantive multiemployer plan termination insurance revision bill or another delay bill through Congress, the August 1, deadline for avoiding mandatory coverage of multiemployer plans under the current plan termination provisions of ERISA was not met and those provisions went into effect.

As in the past, floor action on the substantive bill (H.R. 3904) was delayed until almost the last minute. The Senate passed the measure in a midnight session on July 29. However, the Senate version of the House-passed bill included not only numerous germane amendments, but several nongermane amendments which drew criticism from the Administration as well as a number of House members.

The House did not receive the bill from the Senate until July 31 and attempts to bring the measurement [sic] to the House floor were thwarted both that afternoon and the

following morning. The House then adjourned for the August work period and the Democratic convention, barring further action until it reconvenes on August 18.

Mandatory coverage of multiemployer plans under Title IV of ERISA has been delayed four times since the original January 1, 1978, deadline. The House passed the bill more than a month before the third deadline of July 1, 1980, and agreed reluctantly in June to delay coverage a fourth time because of the Senate's inability to move the proposed legislation (*CLR 1284*, A-6).

[p. A-12]

With only about 48 hours to go before the latest deadline, the Senate passed its revised version and, over the strenuous objections of Senators Harrison A. Williams (D-NJ) and Jacob Javits (R-NY), tacked on a variety of nongermane riders on such issues as the Occupational Safety and Health Act, the Mine Safety and Health Act, and affirmative action requirements (*CLR 1288*, A-14). The two senators argued that attaching the nongermane amendments could impede passage by the House because they involve touchy subjects for House members, all of whom are up for reelection in November.

Members of the two House committees with jurisdiction over the bill, Labor and Ways and Means, were in meetings during most of the day on July 30 trying to decide how best to deal with the Senate bill. Speculation at that time was that they would try to bring the bill to the House floor, strip off the nongermane amendments, perhaps add a few germane amendments, and dump the bill back in the Senate's lap before the deadline.

However, no attempt was made to bring the bill to the House floor until early evening on July 31 and the Senate already had adjourned for the day. In any event, the attempt failed. House rules required unanimous consent before the bill could be considered and Rep. John Rousselot (R-Calif.) objected. Rep. John Ashbrook (R-Ohio) then attempted to bring yet a fifth delay bill to the floor, but that effort also met with an objection.

That scenario was repeated on the morning of August 1, at which point the House adjourned for the recess. The conflict broke down essentially along party lines, with Democrats seeking consideration of the substantive measure and Republicans pressing for another delay. Some sources indicated that the Republicans favored keeping in at least some of the Senate's nongermane amendments, and perhaps adding a few of their own that they could not get through when the House originally took up the bill, and that the clearest way to achieve that goal was by enacting a further delay and demanding a conference with the Senate.

The Republicans apparently were operating on the assumption that the Democrats would cave in on the delay when it became clear that the substantive bill could not be passed before the August recess. The Democrats stuck to their guns, however, and it was Rep. Joseph Gaydos (D-Pa.) who made the formal objection and blocked the final attempt to bring the delay bill to the House floor.

There were indications that if the substantive bill had been sent to the President with the nongermane amendments intact, it might have been vetoed. In a press conference prior to the House action, Secretary of Labor Ray Marshall vowed that the Administration would fight the amendments.

"This is a serious situation and as Secretary of Labor, I am committed to doing everything in my power and this Administration will continue to do everything in its power to assure that the rights of the American worker are preserved," he said. "This Administration will not sit idly by and permit the anti-worker forces in this country to weaken workplace standards which we deem essential for the protection of American workers."

The Department was surprised by the last-minute amendments in the Senate and had only a few hours to lobby against them, Marshall noted. He emphasized that

the Administration is committed to working toward getting a "clean" version of the multiemployer bill approved.

Meanwhile, the termination insurance provisions of ERISA are in effect for all multiemployer plans. Although the ramifications of that probably won't be known immediately, industry sources speculate that some of the weaker plans will take this opportunity to terminate and avoid the employer liabilities that would attach if the provisions of HR 3904 were in operation. Liability under the current provisions is limited to 30 percent of the employer's net worth, as opposed to a continuing obligation to fund that would be imposed under the PBGC bill. For many employers, the net worth figure would be only a fraction of the amount that would be due under the terms of H.S. [sic] 3904.

[p. A-13]

This is particularly true in industries such as mining and construction where heavy equipment may be rented and actual net worth may be small.

Construction industry sources speculate that when the House reconvenes on August 18, one of two actions is likely to take place. One is that Frank Thompson (D-NJ), former chairman of the House Labor Committee's Subcommittee on Labor-Management Relations, will ask for a closed rule for an up or down vote on the Senate bill without the nongermane amendments. Another option is for John Erlenborn (R-Ill.) to ask for a rule to vote on the Senate bill with the germane amendments only, and for a second vote on the nongermane package.

Observers on the management side of the construction industry do not anticipate an exodus by contractors from multiemployer plans. "You don't just jump out the window in this kind of situation," one source remarked. If the situation in Congress now existed this spring during the height of construction contract negotiations, "it would have been a different matter," another source commented, because employers would have been in a position to get out from under their labor agreements under notification

clauses as the expiration date approached. The timing of legislation poses dramatic possibilities for the UMW-coal industry contract talks which will begin soon.

Technically, contractors could abandon their plans as of August 1 and assume that a "window" exists between that date and the time Congress may finally take action on the termination insurance legislation. However, several industry observers discount the likelihood of this kind of action because of the bargaining agreement violations and because of the probability that any action Congress takes will be retroactive to August 1. They also point out that under the Supreme Court's ruling in *Nachman v. PBGC* in May (CLR 1277, A-10, E-1), the courts are likely to give special consideration to Congressional intent instead of the chronology of the legislation.

PBGC: Prospects Grim

The failure of Congress to pass the bill before the deadline will create uncertainties for multiemployer plan participants and will unsettle the collective bargaining process, according to Robert Nagle, executive director of PBGC. The Corporation previously advised Congress that the current law will have a destabilizing effect on many multiemployer plans because it will give employers an incentive to leave the plans at the first sign of financial difficulty.

The eventual effect, Nagle said, will be to hasten the failure of many multiemployer plans and "to impose extremely high costs" on the termination insurance system. These costs will have to be borne by other plans and their participants and they may even bankrupt the insurance program, he said. Congress must move as quickly as possible to complete action on the legislation, he emphasized. "It would be unfortunate if insistence on the nongermane amendments were to further delay passage of this much-needed legislation."

. . . .

COMPLAINT, *Transport Motor Express, Inc., et al. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 81 C 4535 (N.D. Ill., filed Sept. 30, 1981)

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Transport Motor Express, Inc., E.W. Bohren Transport, Inc., and Essex Group, Inc., by their attorneys, complaining of defendant Central States, Southeast and Southwest Areas Pension Fund, respectfully allege.

* * *

54. None of the plaintiffs has continued to perform any of the work covered by any of the labor agreements referred to in paragraphs 11 and 12 or any of the work performed at any of the facilities operated by TMX or Bohren prior to their cessation of common carrier operations.

55. No withdrawal from the Central States Fund by any of the plaintiffs has occurred and no withdrawal liability is owed to the Central States Fund by any of the plaintiffs.

COUNT TWELVE

(on behalf of Plaintiffs TMX and Bohren)

56. Paragraphs 1 through 31 are hereby repeated and realleged and made a part of this Count Twelve.

57. At some or all of the facilities of TMX and Bohren, covered operations permanently ceased before April 29, 1980, within the meaning of Section 4217(a)(2) of ERISA, as amended by the MPPAA, 29 U.S.C. § 1397(a)(2).

58. Even assuming *arguendo* that the MPPAA is constitutional, the withdrawal liability of TMX and the withdrawal liability of Bohren are each limited to the amount determined after application of Section 4217(a)(2) of ERISA, as amended by the MPPAA.

* * *

PBGC OPINION LETTER 83-17 (Aug. 1, 1983)

Dear _____:

This responds to your letter concerning Section 4207 of the Employee Retirement Income Security Act. Specifically, you inquire whether an employer that withdraws from a plan and subsequently renews its obligation to contribute to the plan would continue to be subject to withdrawal liability, and if so, whether the "trust fund is empowered to waive any withdrawal liability in such a circumstance".

In our view, plans have authority to adopt reasonable rules governing collection of withdrawal liability, including abatement. This authority is subject to the terms of regulations to be issued by PBGC under Section 4207 in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan.

Congress also recognized that the PBGC would require time to develop the regulations—more than 60 of them—that it is specifically required or authorized to promulgate under the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). In order not to delay the effective functioning of the 1980 amendments, Congress provided in Section 405(a) of the Multiemployer Act:

if the way in which any [Multiemployer Act] amendment will apply to a particular circumstance is to be set forth in regulations, any reasonable action during the period before such regulations take effect shall be treated as complying with such regulations for such period.

Therefore, pending the issuance of PBGC regulations, plans may adopt reasonable rules to waive or reduce withdrawal liability when a withdrawn employer reenters the plan. Such rules must include whatever restrictions or conditions are contained in PBGC's regulations under Sec-

9a

tion 4207 beginning on the effective date of such regulations.

I hope this response is helpful to you.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

10a

INVENTORY
OF
CONSTRUCTION INDUSTRY

MULTIEMPLOYER PENSION PLANS

[SEAL OMITTED IN PRINTING]

Associated General Contractors of America
1957 E St. NW
Washington, D.C. 20006

[p. 1] AGC PENSION PLAN INVENTORY

February 1983

INTRODUCTION

With the enactment of the Multiemployer Pension Plan Amendments Act of 1980, it became essential that contractors be aware of, and take an active interest in, the financial health of multiemployer pension plans. The current level of unfunded vested liability (UVL) as well as the upward or downward trend of liability are particularly important pieces of information.

This need for more and better data led AGC to undertake an inventory of construction industry multiemployer pension plans. Under the guidance of the ERISA Task Force, AGC has been attempting to gather information on as many of the more than 1,000 construction industry plans (according to PBGC) as possible.

This report represents a vastly expanded version of AGC's interim report of almost 200 construction industry multiemployer pension plans that was released in July, 1982 (see Fringe Benefit Bulletin #18-82). This current report contains information on over 650 plans that contractors contribute to. While this survey does not include all of the construction industry related multiemployer plans, it does include most of the larger plans and appears to provide a fairly representative sample of construction industry multiemployer pension plans.

. . . .

[p. 3]

UNFUNDED VESTED LIABILITY [UVL] (419 Plans)

Attachment A represents individual plan data on plan assets, unfunded vested liability (UVL), the ratio of plan assets to vested benefits, and yearly contributions. An analysis of the level of UVL maintained by each plan reveals a wide swing with a high of \$3.57 billion to no UVL and all variations in between. Of 419 plans providing in-

formation on the level of UVL, a surprising 204 or 48.7 percent had no UVL. This still leaves 51.3 percent of survey plans with UVL and, in many cases, potentially large employer withdrawal liability. It should be noted, however, that much of the UVL data is for 1978 or 1979. Since that time, management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding. This effort should increase the number of plans that are well-funded.

[p. 6]

. . . .

Conclusion

There are few definite conclusions that can be drawn in the aggregate from AGC's pension plan inventory effort excepting that the funding levels of plans vary widely without any apparent pattern. There can be no doubt, although more plans are better funded than we first expected, that unfunded vested liability and potential employer withdrawal liability are still a serious problem for our industry. Contractors involved with plans which are less well-funded should work to improve funding either at the bargaining table or through the plan trustees. Various options are available including an agreement to divert a portion of plan contributions to reduce UVL or an agreement to cap benefits until funding reaches a certain level. Contractors involved with well-funded or fully-funded plans should consider trust or collective bargaining agreement language preventing [sic] any slippage in the funding level. Conversion to a defined-contribution plan should also be reviewed. Defined-contribution plans specifically limit an employer's liability to his agreed-to per hour contributions and also provide significant advantages to construction workers in regards to portability and vesting.

Dan Knise

PBGC OPINION LETTER 82-8 (March 25, 1982)

Dear _____:

This responds to your letter in which you requested our opinion as to the meaning of "the unfunded vested benefits attributable to employees of the employer" as used in Section 4225(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended by* the Multi-employer Pension Plan Amendments Act of 1980 ("Multi-employer Act"). Specifically, you are concerned about interpretations to the effect that this amount is the same as determined under Section 4211 of ERISA to be "the amount of the unfunded vested benefit allocable to an employer" We conclude that the two amounts are not the same.

Section 4202 of ERISA requires, upon the withdrawal of an employer that the plan sponsor "determine the amount of the employer's withdrawal liability." Section 4201(b) of ERISA defines withdrawal liability as "the amount determined under Section 4211 to be the allocable amount of unfunded vested benefits, *adjusted* . . . in accordance with Section 4225." [Emphasis added.]

Section 4225(a) of ERISA provides a limitation on the withdrawal liability of an employer whose withdrawal from a multiemployer plan resulted from a "bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party." In this circumstance the employer's liability is limited to the greater of: (1) "a portion . . . of the liquidation or dissolution value of the employer" determined in accordance with a schedule of marginal rates ranging from 30% to 80% (Section 4225(a)(1)(A), (a)(2)); or (2) "the unfunded vested benefits attributable to employees of the employer." (Section 4225(a)(1)(B)).

The plain language of the statute makes it clear that "the unfunded vested benefits attributable to employees of the employer" under Section 4225(a)(1)(B) is not identical

to the amount of the unfunded vested benefits allocable to an employer under Section 4211. For example, even the "direct attribution" allocation method under Section 4211(c)(4) allocates to the employer a share of unfunded vested benefits which are not attributable to employees of the employer. Moreover, if the two amounts were identical, Section 4225(a) would be meaningless—it would never reduce liability below the amount allocated to the employer under Section 4211.

If the plan sponsor does not or cannot make the determination required under Section 4225(a)(1)(B), the employer's liability is limited to the amount determined in accordance with the schedule provided in Section 4225(a)(2). In any event, the plan sponsor is obligated to apply Section 4225(a), where appropriate. The failure to do so would be inconsistent with Title IV of ERISA, and would be reversible in the dispute resolution process under the Multiemployer Act.

I hope this adequately responds to your question. If you have further questions on this matter, please contact _____ of my staff at the above address or at _____.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

REPORTER'S TRANSCRIPT OF PROCEEDINGS AT
122-23, *Shelter Framing Corp. et al. v. PBGC, et al.*,

Appeal No. 82-5271 (9th Cir., argued December 7, 1982)

[122]

* * * *

THE COURT: Three minutes (inaudible).

MR. MERRILL: Michael Merrill on behalf of G & R Roofing Company.

We are in the unfortunate position of having retroactivity and five other distinct constitutional issues to present, and I guess I will do a little picking and choosing here.

THE COURT: All of it was very well briefed.

MR. MERRILL: Let me initially remark, if I may, that our challenge is viewed to be a facial effect [sic] on the statute.

We have conferred with Mr. Watson on behalf of the Pension Trust and with (inaudible). We can represent to this court that under no conceivable circumstances that actuarial assumptions and methods are being applied where G & R Roofing Company's liability be [sic] [123] less than \$300,000.

We are not talking about a hypothetical litigation in this case. There is no feature about this case that will be mooted by arbitration nor would the issues be meaningful if changed. (Inaudible).

The Pike [sic] decision proceeded to make a facial determination of the constitutionality of the statutes with no facts as to withdrawal liability.

Truly our position cannot be any worse in terms of presenting (inaudible).

* * * *

REPLY BRIEF FOR THE APPELLANT at 13,
Republic Industries, Inc. v. Central Pennsylvania
Teamsters Pension Fund, Appeal No. 82-1251
(3d Cir., filed August 18, 1982)

* * * *

When Johnson was liquidated in August 1981 its remaining assets were transferred to Republic (J.App., 7-8; Republic's Initial Brief at 3, 4 & n.3). If the Fund were prepared to concede that Johnson had effected a bona fide sale of substantially all of its assets in an arm's-length transaction to an unrelated party, the Fund would presumably have made a different claim against Johnson.

Even if § 1405 were applied, Republic would nevertheless be subject to an enormous liability under the statutory formula—approximately \$3,000,000. A crippling retroactive taking of Republic's property would thus still be imposed.

* * * *

Nos. 83-245, 83-291

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF
OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND

DAVID S. PAULL
PAULL & BARNETT
5441 S.W. Macadam Ave.
Portland, Oregon 97201
(503) 221-0077

WILLIAM B. CROW*
JAMES N. WESTWOOD
WILLIAM H. WALTERS
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

* *Counsel of Record*

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Nos. 83-245, 83-291

**In the Supreme Court
of the United States**

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF
OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND

ARGUMENT**Introduction**

R. A. Gray & Company ("Gray") has structured its answering brief in this Court around the following argument:

1. If Gray did not receive adequate advance notice of the retrospective aspects of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act"), those retrospective aspects require "special justification" or the due process clause of the Fifth Amendment is violated.

2. Gray did not receive adequate advance notice.

3. "Special justification" for the retrospective aspects of the Act has not been shown.

4. Hence, the retrospective aspects of the Act are unconstitutional.

In order to sharpen the issues presented to this Court, the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund") will summarize its position in parallel propositions.

1. "Special justification" is a rubric of Gray's own formulation. If Gray did receive adequate advance notice of the Act's retrospective aspects, then Gray must establish that the action of Congress was "arbitrary and irrational," or its due process challenge to the Act's presumptive constitutionality will fail. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

2. Because legislative process provides adequate advance notice, Gray received notice.

3. The Act meets the rationality standard of *Turner Elkhorn*. Even Gray does not deny this.

4. Thus, the Act is constitutional in its retrospective application.

The parallel premises of these diverging arguments pose three issues. First, what is the appropriate standard of due process review? Gray has not disputed the correctness of the Trust Fund's position that if notice accompanied the enactment of the Act, then if the Act is rational, it is constitutional. Rather, Gray argues that if notice was absent, then some undefined requirement of "special justification" should supplant the traditional means-ends rationality test. Thus, the parties' positions raise two questions. If the Act suffers no defect of notice, how does the *Turner Elkhorn* rationality analysis apply to the Act's retrospective aspects? Alternatively, if the Act passed without legislative notice, what "special justification," if any, does due process require? Section I addresses these questions.

Second, does the legislative process provide adequate advance notice? The legislative procedures whereby the Act became law were quite typical and proper. Gray does not deny this. Thus, if legislative process provides legislative notice, Gray had notice. This matter is discussed in Section II.

Third, does the Act pass substantive due process review? Does it pass review on the accepted standard

of *Turner Elkhorn*? Does it pass review if "special justification" is required? Section III provides brief discussion of these questions.

Eschewing the more common method of argument in the alternative and structuring the issues through the above parallel propositions enables the Trust Fund to offer the Court a better map of the lay of the land in this case. The Trust Fund is aware, however, that this method also directs attention to issues the Court may not need to address. Thus, for instance, if the Court agrees that in this instance legislative process provided legislative notice, the Court will not have to consider Gray's contention that the Act lacked "special justification."

I. Alternative Standards of Due Process Review

Any "due process analysis properly begins with a discussion of the appropriate standard of review." *Duke Power Co. v. Carolina Env. Study Gp.*, 438 U.S. 59, 82 (1978). The traditional standard of due process review of legislation "adjusting the burdens and benefits of economic life" is the deferential yardstick applied in *Turner Elkhorn*: Has Congress adopted a rational means to a legitimate end?

Gray does not deny that the traditional due process analysis applies in this instance if Congress provided notice of the Act. Gray argues instead that if Congress did not provide notice, the retrospective aspects of the Act require some unspecified "special justification."

A. The Turner Elkhorn Rationality Standard

Turner Elkhorn states the recognized standard of review if this Court either does not recognize a legislative notice requirement, holds that legislative process is legislative notice, or otherwise concludes that Gray received such notice as was constitutionally due.¹

Turner Elkhorn formulates and applies the *same test* for assessing the due process adequacy of both prospective and retrospective features of legislation. The test is whether "the legislature has acted in an arbitrary and irrational way," 428 U.S. at 15; and the burden is upon the complaining party to establish the absence of rationality. *Id.*

To be sure, the Court emphasizes that "[i]t does not follow" that if "Congress can legislate prospectively

¹ Three circuit courts of appeal have found that employers such as Gray were on notice that legislation, retroactive by its own terms, would alter the withdrawal liability provisions of ERISA. *Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 725 F.2d 843,, slip op. at 942 (2nd Cir. 1984) (prior to the Act's passage, "its existence—together with its retrospective withdrawal liability provision—was a matter of public knowledge."); *Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1272 (7th Cir. 1983) ("During the period between April 29 and September 26, 1980, it was clear to anyone concerned about multiemployer pension plans that employers would be subjected to withdrawal liability under the [Act]. At most an employer could claim only uncertainty as to the details of this liability, not that the liability was a surprise."); *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 638 (4th Cir. 1983) ("Republic had fair notice of its potential liability.").

Gray, moreover, does not deny that it had actual knowledge of the pending legislation.

it [similarly] can legislate retrospectively." *Id.* at 16. Not only must legislation be rational as prospectively applied; but, if the legislation also applies retrospectively, this application also must be rational. With such legislation, a reviewing court may apply the rationality test in two sweeps. Does the legislation, prospectively applied, employ a reasonable means to a legitimate end? If so, did Congress have a legitimate purpose in applying retrospectively its otherwise rational approach?²

Thus, in *Turner Elkhorn*, the Court reviewed an act of Congress whose purpose, in part, was to provide benefits to miners afflicted with pneumoconiosis. Congress' method of providing compensation had a

² The Seventh Circuit has recently read *Turner Elkhorn* in just this way:

"In cases where the legislation in question has retroactive effect, special care must be taken in applying the 'arbitrary and irrational' test to determine if there was indeed justification for the added burden which retroactive legislation imposes on those it regulates. In *Turner Elkhorn Mining*, the Court in no way indicated some special distaste for retroactive legislation, but merely stated that *not only must legislation as a whole be rational and non-arbitrary but also that any retroactive aspects of the legislation must, in particular, be rationally and non-arbitrarily related to legislative goals.*" *Peick*, 724 F.2d at 1266 (emphasis added).

See also *Republic Industries* (4th Cir.), 718 F.2d at 636 ("The Court prescribed as the test for validity the 'rationality' of retrospective legislation * * *").

The Seventh Circuit, however, mistakenly reads *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), to require that the *Turner Elkhorn* rationality test be applied to the retrospective aspects of the Act "with particular attention to wheth-

(Footnote continued)

retrospective aspect in that it required mine operators to compensate former employees who terminated their work in the coal industry before the act was passed. The Court found that, with regard to all aspects of the compensation provisions, Congress had adopted "a *rational measure* to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." 428 U.S. at 18 (emphasis added). In light of Congress' purpose, "[i]t [was] enough to say that the Act approaches the problem of cost-spreading *rationally* * * *." *Id.* at 19 (emphasis added).³

Gray argues that the rationality of a congressional decision to apply certain legislative provisions retro-

(Footnote continued)

er the imposition of liability during the retrospective period is so 'harsh and oppressive' that the retrospective application of the statute must be declared unconstitutional." *Peick*, 724 F.2d at 1269. The better view is that neither *United States Trust*, nor any other opinion of this Court, requires other than the simple, two-fold rationality test of *Turner Elkhorn*. Although what is rational as prospective legislation may not be rational if applied retrospectively, the same "arbitrary and irrational" standard applies in both determinations.

³ Gray alleges that the Court "has not formulated" a "single standard" for testing retroactive legislation for substantive due process adequacy, Gray Brief at 25; Gray also implies that a standard is suggested by language in *Welch v. Henry*, 305 U.S. 134, 137 (1938), to the effect that only if retrospective legislation is "harsh and oppressive" is the due process clause violated. Gray is wrong in each instance. *Turner Elkhorn* endorses the "single standard" of due process analysis for assessment of both the prospective and retrospective aspects of legislation. Moreover, this Court has never relied on the language of *Welch v. Henry* in finding any statute in violation of the Fifth Amendment due process clause. *But see* cases cited by *Welch v. Henry*, 305 U.S. at 147.

spectively is not enough to meet the substantive due process requirements of the Fifth Amendment. *See* Gray Brief at 9, 13, 23. Gray's argument, however, is unconvincing. Gray argues that "[r]ationality" is not the touchstone" of substantive due process because "[i]f it were, Congress could make every statute retroactive on the theory that retroactive application was a rational way of insuring that a new law had maximum effect." Gray Brief at 13. Obviously, Congress could not justify retrospective application of a statute simply on the "theory" that thereby the "new law [will have] maximum effect." The reason, however, is that the phrases "making an otherwise prospective law retrospective" and "increasing the time span of the law's effect" simply state the same thing in different words; and restatement does not provide anything additional in the way of justification. But then the insufficiency of Gray's proposed "theory" in no way undercuts the established position that rationality is the "touchstone" of substantive due process.

B. A Heightened Rationality Standard

Gray does not argue that the Act violates due process if legislative notice of the Act was wanting. Rather Gray maintains that if notice was not given, the retroactive features of the Act require "special justification." Gray's notion of "special justification" is of its own fashioning and begs for explanation. Since, however, this case does not involve a statute passed without legislative notice and Gray has not articulated its proposed standard of "special justification," the Trust Fund restricts its reply on this matter to the general

comment that a limiting condition on any such augmented rationality standard must be that it does not require the Court "to assess the *wisdom* of Congress' chosen scheme * * *." 428 U.S. at 18-19 (emphasis added). Thus, for instance, the much-discussed *Nachman* test would be inappropriate in this context, since, as argued by the Trust Fund in its opening brief, that test unavoidably requires inquiry into the wisdom of the examined legislation.

II. Legislative Notice

The Trust Fund's position is that, if the Court recognizes a notice requirement, normal legislative process normally affords such legislative notice.⁴ In addition, the complaining party has the burden to establish a procedural due process violation, just as the complaining party has the burden to prove an alleged substantive due process violation. In this case, however, no claim of legislative impropriety has been registered.

Instead, Gray rejects the Trust Fund's position that legislative process is legislative notice and argues that the Fifth Amendment requires an opportunity to adjust to new legislation before that legislation becomes effective.

⁴ Gray goes to some lengths to insist that "Congress must give [Fifth Amendment] notice by following the Constitution's procedural requirements for the enactment of a law." Gray Brief at 8; see also Gray Brief at 16 and discussion of *Immigration and Naturalization Service v. Chadra*, U.S., 103 S. Ct. 2764 (1983), Gray Brief at 14-16. The Trust Fund agrees. Those procedural requirements were met in this case, however. Indeed, no claim of any sort of procedural irregularity has been voiced.

Thus Gray argues that the concept of legislative notice as legislative process is "unworkable." For, Gray queries,

"[a]t what point in the legislative process would citizens be held to constructive notice that their rights and liabilities were to be retroactively altered in the future?" Gray Brief at 19 n.7.

Gray's question, however, betrays a misconstruing of the procedural posture in which an issue of inadequate legislative notice arises.

The concept of normal legislative process, it may be granted, is not a rigid one. No single description captures how law is made. But this does not bespeak a weakness in the thesis that legislative process normally provides legislative notice. Where procedural inadequacy is the complaint, it is up to the complaining party to show how the legislative process miscarried; and undertaking this task does not require more than a quite general characterization of legislative procedure.

Gray quotes from the majority opinion in *Untermeyer v. Anderson*, 276 U.S. 440 (1928), for the proposition that "individuals cannot be held to standards which do not yet exist." Gray Brief at 18-19. Such a contention, however, is incompatible with the constitutionality of *any* legislation with retroactive effect, a position which finds no support in the holdings of this Court, as Gray is constrained to admit. Gray Brief at 19 n.7. Furthermore, *Untermeyer* can be distinguished from the case at bar. In *Untermeyer*, the legislation lacked an explicit effective date. 276 U.S. at 445; *see also* 276 U.S. at 447-48 (Brandeis, J., dissenting). By

contrast, the intended retrospective application of the withdrawal liability provisions was a constant feature of the ERISA amendments from the Act's introduction to its eventual passage.⁵ In addition, the *Untermeyer* Court was forced to speculate upon the purpose addressed by Congress in its decision to make certain legislative provisions apply as of a pre-passage date. 276 U.S. at 450 (Brandeis, J., dissenting). In the instant case, however, Congress' purposes are plain.⁶ In any case, the Trust Fund submits that, at this date, the dissenting opinion of Justice Brandeis, 276 U.S. at 446, is more persuasive than that of the majority. See *Smith v. Shaughnessy*, 318 U.S. 176, 179 n.1 (1943) (citing Brandeis opinion with favor).

Gray also cites to *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), to bolster its rejection of the Trust Fund's position. *Texaco*, as Gray quotes to this Court, states that a legislature, to advise its citizens as to the effect of a law, "need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." 454 U.S. at 532. On the question of "reason-

⁵ See, e.g., *Peick* (7th Cir.), 724 F.2d at 1269 ("the intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process").

⁶ "Congress * * * expressly [found] that:

withdrawals of contributing employers from a multi-employer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the

(Footnote continued)

able opportunity," moreover, the Court emphasizes that it shows "the greatest deference to the judgment of state legislatures" as to whether the effective date of a statute is reasonably selected. *Id.* (citations omitted). Since Congress is entitled to no less deference, *Texaco* does not support Gray's position.

Gray would replace the Trust Fund's position on legislative notice with one which asserts that the Fifth Amendment requires "meaningful" notice of legislation, Gray Brief at 8, according to which citizens are

(Footnote continued)

plan, its participants and beneficiaries, and labor management relations . . .

29 U.S.C. §1001(a) (4) (A) (Supp. V 1981).

"After extensive hearings and consideration of the problem, Congress chose a solution which placed the initial burden of sustaining plan stability on withdrawing employers. The imposition of withdrawal liability upon employers who are leaving plans was chosen as the most effective measure both to reduce an employer's incentives to withdraw from a multi-employer plan and to offset the burden otherwise shifted to the remaining employers when a withdrawal nevertheless occurs." *Peick* (7th Cir.), 724 F.2d at 1267.

In addition, "Congress [concluded] that it was necessary to impose the added burden of retrospectivity to fully effectuate Congress' purpose in enacting the [Act]. * * * Congress was concerned that employers would be encouraged to withdraw while the legislation was under consideration if the statute became effective only upon enactment." *Id.* at 39. See also, *Textile Workers* (2nd Cir.), slip op. at 947 ("One of the flaws Congress had perceived in ERISA was its potential for encouraging early withdrawals. It was precisely this built-in weakness that Congress sought to remedy by making the Act retrospective."); *Republic Industries* (4th Cir.), 718 F.2d at 689.

entitled to "adequate opportunity to plan or to conform [their] post-enactment behavior to the law's new requirements." Gray Brief at 20; *see also* Gray Brief at 12, 17-18, 19-20, 24, 60. This position leads Gray to claim that retroactive legislation "by its very nature, provides no notice in the constitutional sense." Gray Brief at 30. Until the law is passed, citizens cannot know what the law will be, *see* Gray Brief at 24; they thus are deprived of the opportunity to assess the implications of the legislation and adjust their affairs.

Gray's reasoning, however, "proves" more than this Court can accept. If, for the reason Gray offers, retrospective legislation fails to provide adequate advance notice, wholly prospective legislation as well would suffer a notice failing. The Act, for instance, became effective the day it became law. Meaningful notice, according to Gray, requires an opportunity to plan one's affairs in the light of the actual law. Planning takes time. Thus, Gray's position necessitates that the citizenry had not received notice of any aspect of the Act on the day it became law. Moreover, this is equally the case with any legislation which becomes effective immediately upon enactment. The consequences of Gray's position, thus, are far reaching. With regard to all immediately effective legislation, either Congress must provide some form of notice, as yet undefined, which goes beyond that provided by the normal legislative processes of our constitutional system, or the judiciary will have to impose an as yet unformulated higher standard of substantive due process review. The

first course simply is not practicable.⁷ The second would require the rejection of the long-standing rule of this Court, adhered to out of deference to its co-equal branches of government, of presuming the constitutionality of duly-enacted laws.

III. The Rationality of the Act

The parties have urged upon this Court competing standards of due process review. The Trust Fund argues that the traditional means-ends rationality test applies. Gray would have the Court fashion a heightened standard of review requiring "special justification" of the Act. Under either standard, however, the retroactive aspects of the Act pass review.

The issue is whether Congress acted rationally in setting a pre-enactment effective date for the withdrawal liability provisions of the Act. If the Court restricts itself to the traditional means-ends inquiry, there can be little doubt of the Act's constitutionality. Gray, moreover, does not contend to the contrary. Congress was concerned with the financial soundness of multiemployer pension plans.⁸ "The imposition of withdrawal liability upon employers who are leaving plans was chosen," in the words of the recent Seventh

⁷ "As a practical matter, a [government] cannot afford notice to every person who is or may be affected by a change in the law." 454 U.S. at 444.

⁸ As this Court previously has noted, "Congress amended ERISA in 1980 to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338, n. 22 (1981).

Circuit opinion, "as the most effective measure both to reduce an employer's incentives to withdraw from a multiemployer plan and to offset the burden otherwise shifted to the remaining employers when a withdrawal nevertheless occurs." *Peick*, 724 F.2d at 1267. In addition, the Seventh Circuit further found "it was necessary to impose the added burden of retrospectivity to fully effectuate Congress' purpose in enacting the [Act]." *Peick*, 724 F.2d at 1269. Under the traditional analysis, therefore, the Act is constitutional.

This conclusion would not be disturbed, moreover, if the Act were judged in terms of a heightened rationality standard, as Gray requests.⁹ The *Nachman* analysis has proved a popular approach to the due process issue here presented. However, for the reasons given above and in the Trust Fund's opening brief the *Nachman* test should not be applied in this instance. Nonetheless, subsequent to the Ninth Circuit's decision here on appeal, three circuit courts of appeal have

⁹ Much of what Gray argues is not focused directly upon the retrospective aspects of the Act. Section II.4., in particular, contains several assertions which, although disputable, would, even if accepted, apply to the Act in its *prospective*, as well as its retrospective, application. For instance, Gray claims that "neither the fact nor the timing of withdrawal is in the employer's hands alone," Gray Brief at 50, and also that Congress has supplied organized labor with a "new weapon for use in collective bargaining," Gray Brief at 52 n.24. An apparent purpose of Gray's in advancing these allegations is to cast itself, as a withdrawing employer, in the role of the helpless victim. Such a view of events, however, overlooks the fact that for some time prior to its withdrawal Gray had made known and acted upon its desire to go nonunion. Joint Appendix at 143.

found that the Act displays no constitutional failing even if it were to be judged by the *Nachman* standard. *Peick* (7th Cir.), 274 F.2d 1270-74; *Textile Workers* (2nd Cir.), 725 F.2d at _____, slip op. at 941-950; *Republic Industries* (4th Cir.), 718 F.2d at 638-639. The Trust Fund respectfully refers this Court to those opinions for discussion supplementing the briefs in this case. If the retrospective aspects of the Act withstand scrutiny under the *Nachman* test, *a fortiori* they pass review under any test for *rationality*.

CONCLUSION

Gray raises two due process complaints, one procedural, the other substantive. Neither has merit, a conclusion more particularly evident when the distinct claims are kept separate. Gray complains that it did not receive notice of the Act; yet the legislative process, as conducted in this instance, provides public notice. More cannot be required. Gray also complains that the Act, in its retrospective application, is substantively inadequate. Rationality is the test of the substantive adequacy of legislative regulation of economic affairs. Did Congress adopt a reasonable approach to a legitimate end in selecting a pre-enactment effective date for the withdrawal liability provisions of the Act? So assessed, the Act easily passes review, a conclusion Gray does not deny. Gray would have this Court apply some stricter standard; but under our constitutional system, Congress legislates. It is thus appropriate, as has been this Court's counsel, that those who find legislation such as the Act unwise or unfair take their

grievances back to Congress. The disputed provisions of the Act suffer no due process failing. The Ninth Circuit's decision to the contrary should be reversed.

Respectfully submitted,

WILLIAM B. CROW
JAMES N. WESTWOOD
WILLIAM H. WALTERS
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

DAVID S. PAULL
PAULL & BARNETT
5441 S.W. Macadam Avenue
Portland, Oregon 97201
(503) 221-0077

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
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PENSION TRUST FUND,
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On Appeal from the United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE
OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
IN SUPPORT OF APPELLEE**

JACK L. WHITACRE
GAIL M. SCHROEGER
SHIRLEY EDMONDS-GOZA
SPENCER, FANE, BRITT
& BROWNE

1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Counsel for the
Chamber of Commerce of the
United States of America,
Amicus Curiae*

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On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the United States Chamber of Commerce and moves the Court for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 36.3. This brief *amicus curiae* is filed with the written consent of two of the three parties, Appellant Pension Benefit Guaranty Corporation and Appellee R. A. Gray & Company. The consent of Appellant Oregon-Washington Carpenters-Employers Pension Trust Fund was requested but refused.

The Chamber represents more than 200,000 business firms and individuals, many of whom are directly affected by the retroactive provisions of the Multiemployer

Pension Plan Amendments Act of 1980 ("MPPAA"). The issue before the Court in this case is whether Congress could constitutionally provide that MPPAA shall take effect on a date prior to its enactment. The constitutionality of retroactive legislation which increases the burdens on employers or substantially restructures closed contractual obligations is of prime interest to the Chamber and its members.

Appellee R. A. Gray & Company approaches the question from the perspective of the circumstances surrounding its own withdrawal from a multiemployer plan. The employers in the consolidated Ninth Circuit cases below were construction industry contractors. However, cases in other circuits have involved other industries. The issue before this Court has a much broader import as it affects employers from a variety of industries who have withdrawn for numerous reasons. The impact of the retroactive provision of MPPAA on employers in many different situations is considered in this brief.

Given the breadth of the impact of the decision and the breadth of the interests represented by this amicus, it is believed that its research and analyses will be of benefit to the Court in determining the constitutionality of the retroactive application of MPPAA. We therefore respectfully request that the Court accept and consider the attached brief *amicus curiae*.

Respectfully submitted,

JACK L. WHITACRE
GAIL M. SCHROEGER
SHIRLEY EDMONDS-GOZA
SPENCER, FANE, BRITT
& BROWNE

1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100

*Counsel for the
Chamber of Commerce of the
United States of America,
Amicus Curiae*

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-245, 83-291

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
v. *Appellant,*

R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES AS AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local Chambers of Commerce and trade and professional associations as well as more than 200,000 business firms and individuals who maintain direct membership. It is the largest federation of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the executive branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests over a wide spectrum of labor relations issues.

The issue before the Court is whether Congress could constitutionally provide that the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on a date prior to its enactment. This issue, as we note in our motion, is of vital importance to Chamber members.

PRELIMINARY STATEMENT

On September 26, 1980, the Multiemployer Pension Plan Amendments Act of 1980 was enacted (herein "MPPAA," 29 U.S.C. §§ 1001-1461; Appendix to Appellant PBGC's Brief, hereinafter referred to as "App.", pp. 13a-74a). MPPAA governs multiemployer pension plans to which employers are required to contribute under their collective bargaining agreements.¹ Under MPPAA, "withdrawal" from a multiemployer plan occurs if the employer "... ceases to have an obligation to contribute under the plan" or "ceases all covered operations under the plan."² Withdrawal from a multiemployer plan creates liability³ in the withdrawing employer for a per-

¹ A "multiemployer plan" is defined under the Act as a plan (a) to which more than one employer is required to contribute and (b) which is maintained pursuant to collective bargaining agreements. Section 1301, App. 25a-26a.

² The definition of factors determining withdrawal differs somewhat for the building and construction industry, the entertainment industry, the long and short haul trucking industry, the household goods moving industry, the public warehousing industry and the retail food industry. Sections 1383-1386, App. 35a-37a.

³ Such liability may result from either "complete" or "partial" withdrawal. Sections 1383-1386, App. 5a-51a. Liability resulting

centage of those pension benefits to which covered employees have a nonforfeitable right, but which cannot be covered by the plans' assets.⁴ When the plan's sponsor⁵ determines that withdrawal has occurred, the plan sponsor calculates the amount of withdrawal liability⁶ and assesses the employer involved. Generally, the date of withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations,⁷ although that date often is uncertain.⁸

from "partial" withdrawal occurs if there is a substantial decline in the employer's plan contributions or there is a partial cessation of the employer's contribution obligation. Section 1385, App. 42a.

⁴ These benefits are referred to under MPPAA as unfunded vested benefits ("UVBs"). Section 1381(a), App. 33a.

⁵ The "plan sponsor" of a multiemployer plan is usually a board of trustees, which establishes or maintains the plan. 29 U.S.C. § 1002(16) (B).

⁶ Under MPPAA, the trustees of the multiemployer fund determine that a withdrawal has occurred, decide the amount of withdrawal liability, and set a payment schedule. Sections 1382, 1399, App. 34a, 60a. The trustees and their actuary are free to make numerous assumptions, including so-called "actuarial" assumptions concerning the future investment performance of fund assets and the number, retirement dates and life expectancies of employees having vested rights. It is these assumptions that forms the basis of the trustees' assessment of unfunded vested benefits, and consequently determines the assessment of withdrawal liability. The trustees are further free under the Act to determine which of a number of methods of calculating withdrawal liability they will employ. Section 1391, App. 35a-42a.

⁷ Section 1383, App. 38a. "Cessation of covered operations" occurs, for example, when an employer closes its business, or sells the business to a party that does not continue plan contributions.

⁸ For example, the date on which an employer's obligation to contribute under its collective bargaining agreement terminates is unclear in many situations, and is frequently disputed. *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 4 EBC 1566 (N.D. Ill.), remanded, No. 83-2026 (7th Cir. slip op. Dec. 19, 1983); *Labbe v. Heroman & Co.*, 521 F. Supp. 1017 (M.D. La. 1981); *Producers Dairy Delivery Co. v.*

The Act's withdrawal liability provisions were made retroactive to April 29, 1980, some five months before enactment. Section 1461, App. 74a.

1. *Employers Affected by MPPAA's Retroactive Provisions*

Under the retroactive provisions of MPPAA, employers whose obligation to contribute to a multiemployer plan or whose operations covered by that plan ceased during the period April 29, 1980 to September 26, 1980, were assessed withdrawal liability under the Act. However, in the cited cases the pension plans continued in operation, receiving contributions from other employers and providing benefits to covered employees.

The retroactive imposition of liability upon employers withdrawing during this five-month period affected employers in a wide range of industries, and involved a variety of circumstances resulting in the cessation of the obligation to contribute to a multiemployer plan or in the cessation of covered operations under a plan. Withdrawal liability in these cases ranged as high as \$19 million.⁹

Western Conference of Teamsters Pension Trust Fund, 654 F.2d 625 (9th Cir. 1981); *Hinson v. NLRB*, 428 F.2d 138 (8th Cir. 1970); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981); *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982).

⁹ *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, *supra*, note 8 (interstate common carriers; withdrawal when companies closed due to severe business losses; withdrawal liability assessed at \$8.6 million, or almost three times the employers' net worth); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir.), *pet. for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983) (No. 83-541) (interstate motor freight carrier; company sold because of operating losses; withdrawal liability imposed when new owner terminated all of company's operations; withdrawal liability assessed at \$189,000 for closure of one operating terminal, and combined liability to all funds for all covered employees at over \$19,000,000; *Republic Industries, Inc. et al. v. New England Teamster & Trucking Pension Fund*, Nos. 81-2551-S2703-S, -2738-S (D. Mass., Aug. 3, 1983), *appeals stayed*, Nos. 83-1657, -1658 (1st Cir., Dec. 1, 1983) (Arrow Transportation Co., one of the consolidated

For example, in *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*,¹⁰ withdrawal occurred when employees voted out the union as their bargaining representative. In numerous other cases, withdrawal occurred when businesses failed or were sold due to business losses. In *Republic Industries, Inc. et al. v. New England Teamsters & Trucking Pension Fund*,¹¹ one of the consolidated defendants was a heavy equipment and railroad car unloader whose business property was annexed by the City of Cambridge, Mass. Unable to find another suitable location, the employer terminated its business and sold its personal property. Withdrawal liability was assessed at \$468,637. In *Sibley, Lindsay & Curr Co. v. Bakery, Confectionary & Tobacco Workers Int'l Union*,¹² the employer, due to financial losses, closed a bakery within one of its department stores. Prior to closing, the employer Sibley and the union entered an agreement "governing their obligations . . . with regard to the closing of the [bakery] operation", under which Sibley provided vacation and severance benefits to terminated employees. Nevertheless, Sibley was assessed withdrawal liability at \$315,927.

The construction contractors in the consolidated Ninth Circuit cases below are typical of employers snared by

defendants, a motor common carrier; withdrawal when business was terminated because of unprofitable operations; withdrawal liability assessed at \$965,534); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404 (S.D.N.Y. 1982), argued, No. 83-7004 (2d Cir., Oct. 3, 1983) (processor and distributor of dye and textile materials; withdrawal occurred when company ceased operations and liquidated assets due to continuing business decline; withdrawal liability assessed at nearly \$1 million).

¹⁰ 553 F. Supp. 523 (W.D. Wash. 1982), appeal docketed, No. 82-3634 (9th Cir. Nov. 18, 1982) (withdrawal liability assessed at \$84,830).

¹¹ *Supra*, note 9.

¹² 566 F. Supp. 32 (W.D.N.Y.), argued, No. 83-7328 (2d Cir., Oct 3, 1983).

the retroactive withdrawal provision when they were unable to negotiate new labor contracts with the union.¹³ These agreements required contributions to pension trust funds. The Shelter Framing and G & R Roofing agreements terminated by their terms on July 1, 1980. When negotiations reached an impasse the obligations of the employers to make contributions to the pension trusts ceased. 705 F.2d at 1506. Similarly, the R. A. Gray agreement was not renewed when it expired on May 31, 1980. A strike failed to produce an agreement (Joint Appendix, p. 13). On July 24, 1981 the fund trustees notified Gray that it had withdrawn from the multi-employer plan as of June 1, 1980. Following the cessation of obligations to contribute, the pension plan trustees assessed liability against R. A. Gray (\$201,359), Shelter Framing (\$727,648) and G & R Roofing (\$687,387). 705 F.2d 1506-07. In Shelter Framing's case, the withdrawal liability exceeded 180 percent of the total stockholder equity in the corporation. 705 F.2d at 1506.

2. The Inherent Differences Between Single Employer And Multiemployer Plans

Any assessment of MPPAA's impact starts with the employer's contractual obligations and responsibilities to the multiemployer plan. Reliance on analysis involving single employer plans is inappropriate.

Under a single employer plan, in addition to promising to fund the plan, the employer promises payment of specific pension benefits to its own employees.¹⁴ The em-

¹³ *Shelter Framing Corp. v. Carpenter's Pension Trust for Southern California*, 543 F. Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983) (No. 83-507).

¹⁴ The court recognized this direct promise of benefits to employees in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional holding*, 442 U.S. 940 (1979) *aff'd on statutory holding*, 446 U.S. 359 (1980), when it held that a liability exclusion clause in the Pension Agreement could not relieve it of its

ployer designs and structures the plan, sets benefit levels and directly controls the investment and management of fund assets. Prior to ERISA, as informed commentators have noted:

Most single employer plans call for a specific benefit amount payable at retirement but do not specify a required employer contribution. They are generally administered by the employer and the employer generally has the right to terminate the plan at any time with no further liability for pension contributions.¹⁵

Congress enacted Title IV of ERISA for the specific purpose of guaranteeing vested benefits previously lost upon plan termination.¹⁶ Thus, ERISA's plan termination guarantee provisions enforced—prospectively—a single employer's contractual promise to provide specified pension benefits to its own employees.¹⁷

obligation to pay vested benefits upon plan termination. As the *Peick* court pointed out, "in relying upon its liability disclaimer clause [to argue unconstitutional impairment of contract rights], Nachman had relied upon nothing more than an asserted right to break the 'true' deal it had struck with its employees." *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir., Dec. 19, 1983).

¹⁵ Bills to Revise the Welfare and Pension Plans Disclosure Act: Hearings on H.R. 2 and H.R. 462 before the House General Subcommittee on Labor of the Committee on Education and Labor, 93d Cong., 1st Sess. 768-769 (1973), Testimony of John B. Hall, Deputy Assistant Secretary for Tax Policy, Department of Treasury.

¹⁶ *Nachman*, *supra*, note 13. Congress expressly recognized the need to make employers liable for pension benefits promised to their employees, noting that "it is unconscionable that an employer is presently under no legal obligation to make good on his pension promise," II Legislative History of the Employee Retirement Income Security Act of 1974, at p. 3479 (1976).

¹⁷ In the single employer context, Title IV of ERISA, like the Black Lung Act at issue in *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976), was in fact a rational measure to spread the cost of the employee benefits to those who had profited directly from the fruits of the employee's labor.

With respect to multiemployer plans, the courts below and commentators have noted:

[They] have significantly different characteristics. They generally require a specific employer contribution. They generally are administered by a joint employer-union board of trustees which has the authority to set benefits. The employer's obligation is generally limited to making the specific contribution and a participating employer cannot terminate the plan although he may withdraw from it.¹⁸

* * *

... [M]ultiemployer funds predominate in industries typified by small employers, shifting work forces and work places and portability of employment. . . . The multiemployer character of the fund permits employees to accumulate pension credits even while shifting employment from one employer to another, and protects their pension rights from being lost by the 'withdrawal' of any particular employer. The multiemployer character of the fund also protects the solvency of the fund because the impact on the fund from the 'withdrawal' of any particular employer is minimized; and when new entrants take the place of withdrawing employers, the pool is replenished.¹⁹

Thus, as collective bargaining agreements are created and terminated, as employers come and go within an industry, and as the work shifts from employer to employer, a multiemployer fund receives contributions from employers currently required under their union contracts and maintains promised benefit levels for employees who remain in "covered employment." While contributions from one employer may decrease, the contributions²⁰

¹⁸ Hall testimony, note 15, *supra*.

¹⁹ *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, n. 1 (4th Cir. 1983).

²⁰ "The same contribution rate is required of each employer without reference to the cost factors of his own employee group. As a

from another employer may increase, and vested benefit rights of individual employees, irrespective of who employed them, are protected through the fund's investment and management of the monies collected from its employer contributors.²¹

Unlike the employer maintaining its own plan, an employer contributing to a multiemployer plan has little, if any, control over the relationship between contribution levels and promised benefits, the management of pension funds, the setting of benefit levels, or the subsequent financial ability of the fund to provide these benefits. These decisions are made by plan trustees, and while multiemployer plans include employer trustees, those trustees are legally bound to jointly act only as fiduciaries for covered employees, and are expressly prohibited from representing their own business interests. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

Under Title IV of ERISA, the employer that withdrew from a multiemployer plan sustained potential liability for a share of unfunded nonforfeitable benefits guaranteed by the PBGC only if that plan terminated within five years after withdrawal. Even then, that liability was contingent on the PBGC exercising its discretionary authority to guarantee benefits of the terminated plan and

result, some employers may pay more and others less than their share of the cost of benefits for their own employees . . .

[T]he Union is the cohesive force demanding that employers accept the plan's average experience in lieu of their own costs and offering a limitation of contribution liability as a *quid pro quo*." J. Malone, *Collectively Bargained Multi-Employer Pension Plans*, 95-96 (1963).

²¹ Congress recognized that this multiemployer system of protecting pension benefits was more stable than single employer plans, which was one of the main reasons it declined to require mandatory PBGC guarantees for multiemployer plans when ERISA was enacted. 126 Cong. Rec. H4116 (daily ed. May 22, 1980) (remarks of Rep. Biaggi). See also, *Connolly v. PBGC*, 581 F.2d 729, 734 (9th Cir. 1978).

to seek recovery against that employer. Recovery was limited to the amount of benefits guaranteed by the PBGC and to thirty percent of the employer's net worth.

Under MPPAA, a withdrawing employer's liability is based on the proportion of its contributions over the five years prior to withdrawal relative to all contributions received by the fund during the same period.²² Under this formula, there is no direct relationship between an employer's level of contributions and the amount of vested benefits for its own employees.²³ When the employer's obligation to contribute ceases, or when it ceases covered operations, it becomes absolutely liable for a proportionate share of the plan's unfunded vested benefits without regard to the possibility of plan termination, the plan's financial needs or the amount of vested benefits, if any, of its own employees.

3. *Background of MPPAA*

Under Section 1381(c)(1) of ERISA, mandatory PBGC guarantees for benefits payable upon multiemployer plan terminations were to become effective January 1, 1978. In 1977, Congress delayed implementation of the January 1 effective date and ordered the PBGC to investigate alternatives for multiemployer plans.²⁴ This effective date for the mandatory guarantee program was delayed three more times while Congress decided how to protect multiemployer plans.²⁵ While the PBGC alleged

²² This is the "presumptive" method. Section 1391(b), App. 53a-66a.

²³ Where employees have relatively little seniority and few or no past service credits, they would be entitled to a much smaller proportion, if any, of a fund's unfunded vested benefits than is reflected in their employer's proportionate level-of-contributions liability.

²⁴ See *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1030-31 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983).

²⁵ The effective date for mandatory coverage of multiemployer plans was extended four times: to June 30, 1979 (Pub. L. No. 95-

that the possibility of employer withdrawals and plan terminations was a "key problem" of ongoing multiemployer plans,²⁶ no Congressional efforts were made to provide protections for multiemployer plans beyond the PBGC discretionary insurance program, or to deter employers from withdrawing from plans in anticipation of eventual legislation.

On May 3, 1979, almost two years after Congress commissioned the PBGC investigation of multiemployer plans, an administration bill was submitted to Congress containing the PBGC's legislative recommendations and proposing an effective date of February 27, 1979—the date the PBGC recommendations had been submitted.²⁷

During the year that followed submission of this bill employers who would have been "caught" by the proposed retroactive effective date²⁸ vigorously lobbied Congress to move that date forward, arguing that the original effective

214, 91 Stat. 1501 (Dec. 19, 1977); to May 1, 1980 (Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979), to July 1, 1980 (Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980), and to August 1, 1980 (Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980), before mandatory coverage was finally superseded by the MPPAA. At no time during this period were steps taken to deter the possibility of employer withdrawals prior to the eventual implementation of mandatory coverage or the statutory scheme ultimately embodied in MPPAA.

²⁶ See Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978). The PBGC argued that the 30% net worth limitation enabled employers to "take advantage" of the single employer insurance system, relying on PBGC guarantees of benefits while limiting their own potential liability if a plan terminated. Pension Benefit Guaranty Corporation, Multiemployer Study Required by Pub. L. 95-214 (July 1, 1978).

²⁷ The threat of retroactivity was considered necessary by one member of Congress to deter "opportunistic" withdrawals while the legislation was under consideration. 126 Cong. Rec. 10156 (daily ed. July 29, 1980) (Sen. Matsunaga).

²⁸ 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (Sen. Javits).

tive date was unfair to employers that had "acted in complete good faith on the basis of the law and general public knowledge at the time."²⁹ Congress accepted these arguments and ultimately the Senate on July 29, 1980 adopted the bill with an April 29, 1980 effective date for withdrawal liability.

SUMMARY OF ARGUMENT

Due Process requires that retroactive pension benefit legislation serve an important public purpose, that its impairment of private contracts must be reasonable, and that the impairing legislation be reasonably related to fulfillment of the public purpose to be served.

Retroactive enactment of MPPAA unreasonably imposes a dramatic change in contractual obligations upon employers who must be able to rely on existing law in closing transactions. The "withdrawing" employers were denied opportunities available to employers withdrawing after enactment to select options to protect against staggering potential liabilities. This retroactive liability neither meets any asserted Congressional purpose, nor is it narrowly drawn to accomplish the asserted purpose of deterring "opportunistic" withdrawals. This arbitrary and overreaching alteration of closed contractual obligations imposes upon these employers a burden so harsh and oppressive that it cannot withstand scrutiny under the Due Process Clause of the Constitution.

²⁹ Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, 96th Cong., 2d Sess. at 173 (1980). *See also*, Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, 96th Cong., 1st Sess. at 111 (1979).

ARGUMENT

I. RETROACTIVE APPLICATION OF THE MPPAA VIOLATES THE FIFTH AMENDMENT

A. Constitutional Standards

The Due Process Clause of the Fifth Amendment restricts enactment of retroactive legislation if it is "harsh and oppressive."³⁰ In order to withstand constitutional scrutiny, this Court has stated that retroactive pension benefit legislation must serve an important public interest, the impairment of private contracts must be reasonable and the impairing legislation must be reasonably related to fulfillment of the public interest sought to be served. *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935).

In *Alton*, this Court examined the constitutionality of the retroactive feature of the Railroad Retirement Act of 1934, which required employers to pay pensions to individuals whose employment had ended prior to enactment. The Court unanimously held that retroactive application of that Act was contrary to the Fifth Amendment Due Process Clause.

In reaching this conclusion, the Court examined the effect of retroactivity on pre-existing contractual rights:

Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier.

³⁰ *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13 (1977), quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938).

* * * [I]t resurrects new burdens for transactions long since passed and closed.³¹

The proponents of the statute claimed retroactive application was adopted "to assure those on furlough, or temporarily relieved from duty subject to call, the benefit of past years of service . . . and to prevent the carriers from escaping their just obligations by omitting to recall these persons to service."³² They further argued that retroactive application would promote efficiency or safety in the future operation of the railroads.³³ The Court rejected these arguments and found that these purposes did not outweigh the "onerous financial burden" placed on employers and that retroactivity was not reasonably aimed at serving the asserted purposes.³⁴

The Court has followed this analysis³⁵ of retroactive legislation as recently as 1978, when, in *Allied Structural Steel*,³⁶ it sustained a challenge to the constitutionality of

³¹ 295 U.S. at 349-350. This application to former employees included employees who had been discharged for cause or otherwise unfaithful to the employer.

³² *Id.* at 348.

³³ *Id.*

³⁴ *Id.* at 350.

³⁵ This analysis was also applied in the following cases: *United States Trust Co. v. New Jersey*, *supra*, note 30; *Treigle v. Acme Homestead Ass'n*, 297 U.S. 728 (1936); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).

³⁶ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 262, n. 9 and 241 n. 12 (1978). Several cases have indicated that the standard under the Contract Clause, Article I, Section 10, of the Constitution, is the same as that utilized in determining the validity of retrospective legislation under the Due Process Clause of the Fifth Amendment. See e.g., *Veiz v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940). "Although there is no clause expressly forbidding the federal government to pass laws impairing the obligation of

Minnesota's Private Pension Benefits Protection Act. In doing so, the Court first examined the impact on contractual relationships:

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law and the parties are entitled to rely on them.³⁷

This Court found the Act impacted a "basic term" of the pension contract: the funding of a pension plan, "an area where the element of reliance was vital."³⁸

Following the *Alton* analysis, this Court then held the severity of the impairment on private contracts measures the "height of the hurdle the state legislation must

contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to a deprivation of property without due process." Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 852, 890-91, n. 18 (1944). In any event, fairness dictates application of Contract Clause principles where a retroactive statute radically rewrites closed contractual arrangements, resulting from good faith bargaining, on which the parties have justifiably relied. Certainly, no rationale would justify a divergent standard for federal legislation. See also, *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 373 (1935); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 n. 25; *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 695 (1960); *Marcus Brown Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921). Constitutional standards for analysis of retroactive legislation have developed along substantially identical paths for both Due Process and Contract Clause challenges.

³⁷ 438 U.S. at 245.

³⁸ *Id.* at 246.

clear.”³⁹ The impairment being severe, the Court concluded, “[L]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.”⁴⁰ After determining that the “severe disruption of contractual expectations” was not justified by an “important general social problem”,⁴¹ the Court concluded the retroactive vesting feature of the Act was unconstitutional.⁴²

³⁹ *Id.* at 244-45.

⁴⁰ *Id.* at 244, citing, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22. These considerations developed from a series of cases that arose from the efforts of states to deal with unusual economic emergencies resulting from the depression of the 1930s. See *Home Building & Loan Ass'n v. Blaisdell*, *supra*, note 36; *W. B. Worthen Co. v. Thomas*, *supra*, note 35 (retroactive law was held invalid since it was not precisely and reasonably designed to meet a “grave temporary emergency” in the interest of the general welfare); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (Arkansas law that limited the rights and remedies of mortgage bondholders was found unconstitutional because the Act was not narrowly aimed at the problem); *Treigle v. Acme Homestead Ass'n*, *supra*, note 35 (Act’s interference with contract rights was not justified by alleged public interests). See also, *Louisiana v. Pilsbury*, 105 U.S. 278 (1882); *Murray v. Charleston*, 96 U.S. 432 (1878).

⁴¹ 438 U.S. at 247. The proponents of the Act argued the Act was an effort to cure an alleged gross unfairness in the private handling of employees’ pension funds. 438 U.S. at 252.

⁴² In *United States Trust Co. v. New Jersey*, *supra*, note 30, this Court applied the same principles to hold invalid a New Jersey statute which repealed an earlier statutory covenant to Port Authority bondholders that had limited the ability of the Port Authority to subsidize rail passenger transportation from its revenue and reserves. A narrow exception to the constitutional proscription of retroactive legislation exists for income tax legislation. This is permitted because income taxes are “a way of apportioning the cost of government.” *Welch v. Henry*, 305 U.S. 134, 146 (1938). Even in the tax area this Court has held that retroactive legislation may not be imposed constitutionally if it is significantly different from prior taxes. See e.g., *Coolidge v. Long*, 282 U.S. 582 (1931); *Untermeyer v. Anderson*, 276 U.S. 440 (1928).

For the reasons set forth below, we respectfully submit retroactive application of MPPAA is contrary to *Alton*, *Allied Structural Steel* and the other Supreme Court cases evaluating the constitutionality of retroactively applied legislation.⁴³

B. Retroactive Application of MPPAA Fundamentally Changes Pre-Existing Contracts by Imposing Enormous New Liabilities on Employers

The retroactive application of MPPAA shares with *Alton* and *Allied Structural Steel* a harsh burden imposed upon employers for completed transactions. The retroactive affects were so "wholly unexpected and disruptive that harsh and oppressive consequences followed."⁴⁴ The effect of MPPAA on the contractual obligation was not only severe, but was far beyond any reasonable expectations of those employers given the nature of the contract and statutory obligations existing at that time. As discussed previously, the impact on individual employers has been devastating.⁴⁵ Many employers who withdrew between April and September of 1980 did so because they were unable to reach agreement on renewal of collective bargaining agreements, because their businesses failed or were sold due to operating losses, or because employees voted to change their bargaining repre-

⁴³ The majority of circuits that have addressed the constitutionality of federal pension legislation has followed the approach utilized in *Alton* and *Allied Structural Steel*. See *Nachman*, *supra* note 14; *Republic Industries*, *supra* note 9; *Shelter Framing Corp.*, *supra* note 13. Even the Seventh Circuit in *Peick* recognized that "there is no question that certain principles which have developed under the contract clause are applicable in due process analysis . . ." *supra*, note 24, slip op. at p. 29.

⁴⁴ *Shelter Framing*, 705 F.2d at 1510, citing *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), vacated on other grounds, 430 U.S. 952 (1977).

⁴⁵ See Preliminary Statement pp. 4-6 for examples of the impact of retroactive liability upon employers.

sentative.⁴⁶ These employers now are required, after withdrawal occurred, to pay sums that seriously threaten their solvency.

This severe impairment is not diminished by the pendency of proposed legislation. Employers cannot be charged with the responsibility of predicting congressional action. "Forecasting congressional action is akin to forecasting the weather or the stock market: There are simply too many unpredictable variables involved."⁴⁷ This is particularly true of the turbulent and highly political history that preceded enactment of MPPAA.

Prior federal regulation of pension plans could not put employers on reasonable notice that drastic changes in their liability for a fund's unfunded benefits would attach before the new law was adopted.⁴⁸

As we noted, under ERISA, potential liability beyond that created by the collective bargaining agreements existed only in the event the plan terminated within five years of withdrawal and the potential liability was limited to 30% of the employer's net worth.

Thus, under MPPAA's retroactive provisions, affected employers are converted from promisors of specific contributions under collective bargaining agreements to absolute insurers for the overall pension benefits promised

⁴⁶ See *supra* notes 9 and 10.

⁴⁷ *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery and Tobacco Workers*, *supra*, note 12: "No one should be held reasonably to anticipate a given type of congressional action on any subject. Outside the tax area, there is no authority that imposes on anyone the burden of predicting congressional action." 566 F. Supp. 32, 36, quoting *Shelter Framing*, 543 F. Supp. 1234, 1249 (D.C. Cal. 1982).

⁴⁸ Prior federal labor-management legislation, including regulation of jointly-administered funds and reporting and filing requirements, did not address or affect substantive pension contractual obligations, but merely imposed procedural or technical requirements.

by the pension plan without regard to the plan's actual financial stability.⁴⁹

C. Retroactive Enactment of MPPAA Does Not Rationally And Reasonably Meet The Asserted Social Purpose

1. The Asserted Purpose

Because of this unforeseen impact on contractual rights and closed transactions, MPPAA can only withstand constitutional scrutiny if it is narrowly drawn to meet an important public purpose.⁵⁰ MPPAA cannot withstand that attack.

The PBGC's fear of massive pre-enactment withdrawals was unjustified. The lynchpin of the PBGC's "rationality" argument is that the employer has complete control over the circumstances and timing of withdrawal. The statutory determinative factors and the facts in the cases below show just the opposite. Indeed, other federal statutory law regulating labor-management relations bars "hasty" bad faith withdrawals.⁵¹

⁴⁹ In *Peick*, the Seventh Circuit attempted to distinguish the MPPAA cases from *Allied Structural Steel*: "In *Allied Steel*, the Court invalidated a Minnesota statute which imposed liability on employers for the payment of unfunded benefits, *vested by operation of law*, upon the termination of a private pension plan. In *Nachman* and the case before us, the liability imposed on employers is based upon *contractually vested* pension benefits." *Peick, supra*, note 14, slip op. at pp. 44-45. However, as our analysis demonstrates, the multiemployer plan, not the individual employers, make contractual promises of vested benefits to employees. The employers only promised to pay specific contributions under collective bargaining agreements during the term of those agreements.

⁵⁰ *Allied Structural Steel*, 438 U.S. at 245. See *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979).

⁵¹ In fact, there is nothing in the legislative history of MPPAA establishing the need for a five-month retroactive period. On the contrary, Congress repeatedly *deferred* the effective date for mandatory guarantees, until it could fashion a system of guarantees that would be financially feasible. See *Peick*, 539 F. Supp. at 1032-1033.

Unlike an employer contributing to its own single employer plan, an employer contributing to a multiemployer plan is bound by the terms of its collective bargaining agreement to make plan contributions during the term of that agreement.⁵² Even when the agreement expires, the employer is bound under the National Labor Relations Act ("NLRA") to engage in good faith bargaining and to continue pension contributions. The employer cannot unilaterally withdraw until impasse is reached.⁵³ The restrictions under the NLRA thus create major obstacles to any precipitous, unilateral, bad faith employer withdrawals.

As the cases challenging retroactivity demonstrate, the timing of most withdrawals under MPPAA is the product of circumstances beyond the control of the employer. Since employer participation in multiemployer plans is by statutory definition the product of collective bargaining, these extrinsic factors created by the union-employer relationship are the primary determinants of when withdrawal occurs under the Act. Thus, the imposition of withdrawal liability retroactively upon individual employers is an improper solution to ostensible concern for massive plan terminations. If Congress was, in fact, concerned that massive opportunistic withdrawals would in fact cause plans to terminate, it surely would not have repeatedly deferred the effective date for mandatory guarantees, thereby increasing the opportunity for withdrawal.⁵⁴

⁵² See e.g., *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978).

⁵³ By virtue of Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (d), the obligation to contribute to fringe benefit funds survives the expiration of the collective bargaining agreement and the employer may not make unilateral changes until an impasse in bargaining is reached. *Hinson v. NLRB*, 428 F.2d 133, 137 (8th Cir. 1970); *NLRB v. Sir James, Inc.*, 446 F.2d 570 (9th Cir. 1971); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980).

⁵⁴ There is no evidence that massive pre-enactment withdrawals occurred. Over 70 employers who withdrew from plans between

As noted, the effective date of MPPAA was pushed forward from February 27, 1979 to April 29, 1980, to benefit employers who would have been "caught" by the original effective date. 126 Cong. Rec. S.10101 (daily ed. July 29, 1980) (Sen. Javits). Those employers convinced Congress that they should be protected from withdrawal liability because they had acted in "good faith" on the basis of the state of the law and general public knowledge at the time.

The only conclusion to be drawn from Congress' deferral of the retroactive date is that it had no real cause to impose retroactive liability on employers.⁸⁵

2. Addressing the Purpose

If retroactivity was aimed only at those employers who illegitimately tried to escape the multiemployer fund, the legislation was not limited, as required, to meet that narrow concern. Under the Due Process Clause, Congress is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well.

MPPAA makes no effort to distinguish between "good faith" and "bad faith" withdrawals occurring between April 29 and September 26. Instead, it adopted an arbitrary retroactive date that protected some employers

April 29, 1980, and September 26, 1980, have sued challenging the constitutionality of the retroactive provisions of MPPAA. With over 2000 multiemployer plans covering thousands of employees in the United States, the potential impact of these withdrawals on the multiemployer plan system is clearly miniscule. Yet, while this number represents a tiny fraction of all employers contributing to multiemployer plans, the collective liability assessed against these employers is \$64,609,110—representing an average liability of close to one million dollars.

⁸⁵ One member concluded that "the original purpose of a retroactive date—namely to avoid encouragement of employer withdrawals while the bill was being considered—ha[d] been achieved." 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (Sen. Javits).

while indiscriminately punishing other employers who, with similar good faith reliance on the law at the time, withdrew after April 29 and before the MPPAA was actually passed.⁶⁶ In view of Congress' recognition that withdrawals could well occur in good faith, this overbroad and indiscriminate punishment of those employers cannot stand the Constitutional test.

Because employers contributing to multiemployer plans have little or no control over the timing of most "events of withdrawal," the retroactive application of the Act imposed an arbitrary and irrational punishment on employers whose obligations—due to the timing of union elections, bargaining negotiations, contract termination, or severe business decline—ceased between April 29 and September 26, 1980.

3. *Moderating the Impact*

Employers facing potential withdrawal liability after enactment of MPPAA on September 26, 1980, were afforded alternatives under the new Act. Under Section 1405, withdrawal liability is limited under circumstances where an employer engages in a bona fide sale of all or substantially all of its assets in an arms length transaction to an unrelated party; or where an insolvent employer undergoes liquidation or dissolution.⁶⁷ As the court noted in *Sibley*:

The company had several options had it known that substantial withdrawal liability was going to be imposed. [The employer] could have chosen to continue operating [the company], or sold [the company's]

⁶⁶ There can be no difference between employers who withdrew for good faith reasons after February 27, 1979 and those who withdrew for good faith reasons after April 29 with respect to the asserted purposes of retroactivity "to avoid encouragement of employer withdrawals while the bill was being considered." *Supra*, note 55.

⁶⁷ App. 68a.

assets to a company which participated in the plan and intended to remain in business. Alternatively, [the employer] could have withdrawn partially from the fund and reduced its withdrawal liability. 29 U.S.C. § 1386.

566 F. Supp. at 36.

For an employer who withdrew between April 29, 1980 and September 26, 1980, there was no opportunity safely to avail itself of the moderating provision ultimately available under the Act.⁵⁸

An employer faced with declining business in the summer of 1980 could not have known that by selling to a successor employer who maintained contribution to its plan, or by going out of business altogether, the withdrawing employer could avoid or mitigate the potentially ruinous liability that would later be assessed against it. Similarly, an employer whose collective bargaining agreement had expired and who was engaged in negotiation of a new contract during the summer of 1980 might well have re-evaluated its negotiating position had it known that a unilateral change following bargaining to impasse would result in staggering withdrawal liability.⁵⁹

⁵⁸ MPPAA does not contain three significant moderating provisions of ERISA: the contingent nature of the liability, the cap on payments placed at thirty percent of an employer's net worth, and the calculation of liability based on only the amount guaranteed by the PBGC, not the full value of the employees' vested benefits. Under MPPAA, there are no such significant features to moderate the imposition of large withdrawal liability.

⁵⁹ Shelter Framing's liability, created after bargaining to impasse with the union, was assessed at over twice the corporation's net worth. 705 F.2d at 1506, n. 5. In *Transport Motor Express v. Central States, Southeast and Southeast Areas Pension Fund*, No. 83-2026 in the U.S. Court of Appeals for the 7th Circuit, plaintiffs closed down their business in the face of severe losses. Several months later, after MPPAA was enacted, withdrawal liability was assessed against the companies at over \$8.6 million—nearly three times their combined net worth.

D. *Turner Elkhorn* Does Not Require a Different Analysis or a Different Result

Since the underlying standards for Due Process and Contract Clause analysis have developed along substantially identical paths, and no rationale justifies a divergent analysis for federal legislation,⁶⁰ the Ninth Circuit focused on proper considerations. While the Contract Clause itself does not apply to federal legislation, the assertion of a vague "rationality" standard, without regard to the statute's impact and purpose, truncates any meaningful Due Process protection. Yet this protection is particularly important in the pension obligation area. In completing transactions there, an employer must be able to rely on existing law and existing contractual obligations.

This Court's decision in *Turner Elkhorn*⁶¹ does not require a different result. While this Court sustained a statute which required mine operators to provide compensation to former employees who had contracted black lung disease during their employment in the operator's mines, the burden placed on employers was insignificant compared to the effects of black lung disease, a progressive, irreversible disease directly *resulting from* unhealthy mining conditions. The mine operators had "clearly been aware of the danger" of exposure to mining conditions.⁶² Conversely, the financial stability or instability of multi-employer pension funds is by no stretch of the imagination a direct result of individual employers withdrawing from the plan. While the Act in *Elkhorn* was designed to allocate to the employer an actual, measurable cost of its business, MPPAA retroactively requires an employer to supplement a fund over which it has no control and in

⁶⁰ See *supra*, note 36.

⁶¹ *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976). See *supra*, note 17.

⁶² *Id.* at 17.

an amount that far exceeds bargained-for contributions. As we have shown, retroactive liability to multiemployer plans simply bears no relationship to the liabilities created by an individual employer's limited contractual obligation.

Moreover, the *Elkhorn* statute contained moderating features. For a substantial period following enactment, companies were free to leave the industry and avoid liability altogether,⁶³ and the government was responsible for a large portion of the costs.⁶⁴ Such considerations do not exist here.

In *Elkhorn*, this Court distinguished the statute there from retroactive pension legislation in *Alton*:

The point of black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employees labored to allocate to the mine operator an actual, measurable cost of his business.⁶⁵

Here the analysis of *Alton* and *Allied Structural Steel* governs. Because retroactive enactment of MPPAA cannot meet the Due Process standards of the pension benefit cases, as the Ninth Circuit found below, it must be held unconstitutional.

CONCLUSION

Retroactive enactment of MPPAA has effected a substantial impairment of contract expectations. It was neither reasonable nor necessary to serve any vital public purpose. If a public purpose did exist, less drastic means of meeting that purpose were available. This is precisely

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 9-10.

⁶⁵ *Id.* at 19.

the situation that the Due Process Clause was designed to prevent.

Accordingly, retroactive application of MPPAA should be found to be unconstitutional.

Respectfully submitted,

JACK L. WHITACRE
GAIL M. SCHROEGER
SHIRLEY EDMONDS-GOZA
SPENCER, FANE, BRITT
& BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100

*Counsel for the
Chamber of Commerce of the
United States of America,
Amicus Curiae*

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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No. 83-245 & 83-291

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF OF
G & R ROOFING COMPANY AS *AMICUS CURIAE***

Michael E. Merrill
Stephen J. Schultz
Mark T. Bennett
MERRILL AND SCHULTZ,
A Law Corporation
4420 Hotel Circle Court
Suite 345
San Diego, California 92108
(619) 293-3722

Counsel for amicus curiae

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On Appeal From the United States Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

G & R Roofing Company ("G & R") respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the position of appellee R.A. Gray & Company.¹ In support of this motion, G & R states:

¹Pursuant to Sup.Ct.R. 36.3, counsel for G & R requested the consent of counsel for the parties to the filing of a brief *amicus curiae*. Counsel for appellant Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to the filing of the brief necessitating this motion. Counsel for appellant Pension Benefit Guaranty Corporation ("PBGC") and for appellee R.A. Gray & Company have consented to the filing of the brief.

G & R is a California corporation and a contractor engaged in the building and construction industry. G & R is an appellee and cross-appellant in the consolidated appeal resulting in the opinion of the court of appeals which is sought to be reviewed here. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983).

G & R is a respondent and cross-petitioner in *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.*, Nos. 83-507 & 83-702 (U.S. filed Sept. 26 and Oct. 26, 1983), which seeks review of the same court of appeals decision before the Court in the above-captioned matter as it pertains to appeals consolidated for disposition. G & R was granted permission to file a brief *amicus curiae* with regard to the jurisdictional statement in this appeal.

The court of appeals struck down as unconstitutional the imposition of withdrawal liability on G & R, as well as the other employer parties, Shelter Framing Corporation and R.A. Gray & Company. The withdrawal liability was assessed under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. §§ 1381-1461 (Supp. V 1981), for withdrawals from multiemployer pension plans before the enactment date of the statute on September 26, 1980, but after its retroactive effective date of April 29, 1980.

On July 1, 1980, G & R terminated its collective bargaining relationship with the Carpenters' union. On September 2, 1981, the Carpenters Pension Trust for Southern California ("CPT") assessed a withdrawal liability against G & R in the amount of \$687,387. The lump sum withdrawal liability totaled forty percent of the company's net worth. If G & R paid the withdrawal liability on an installment basis, the annual liability would represent ninety-four percent of G & R's net income during the 1981 year. *Shelter Framing Corp.*, 705 F.2d at 1506.

The appeal seeks to reverse the court of appeals' decision holding the retroactive imposition of withdrawal liability to be unconstitutional. G & R has an essential and unique interest in the appeal, as G & R was a party to the court of appeal's decision and the record developed by G & R in the district court was part of the record considered by the Ninth Circuit in disposing of CPT's appeal. G & R's request for leave to file the attached brief *amicus curiae* is made in furtherance of that interest.

G & R seeks by the brief *amicus curiae* to support the position of appellee R.A. Gray & Company. G & R will demonstrate to the Court that MPPAA's retroactive application cannot survive constitutional scrutiny on due process grounds, this Court's longstanding decision in *Railroad Retirement Co. v. Alton Railroad Co.*, 295 U.S. 330 (1935), and subsequent decisions of this Court which have considered the constitutionality of retrospective legislation. Because G & R believes that the facts developed by G & R in the district court and their application to the applicable law will not be adequately presented to this Court in reviewing the court of appeals decision it is important that the attached brief *amicus curiae* be considered by the Court.

Accordingly, G & R respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

Michael E. Merrill
Stephen J. Schultz
Mark T. Bennett
MERRILL AND SCHULTZ,
A Law Corporation
4420 Hotel Circle Court
Suite 345
San Diego, California 92108
(619) 293-3722

Counsel for amicus curiae

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,

Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellant,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

BRIEF OF G & R ROOFING COMPANY AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

G & R Roofing Company ("G & R") is an appellee and cross-appellant in the decision of the court of appeals which is sought to be reviewed on appeal here. G & R is also a respondent and cross-petitioner in *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.*, Nos. 83-507 & 83-702 (U.S. filed Sept. 26 and Oct. 26, 1983), which seeks review of the same court of appeals decision before this Court in the above-captioned matter. The petition and cross-petition in Nos. 83-507 and 83-702 together present a comprehensive challenge to the constitutionality of the Multiemployer Pension Plan Amendments

Act of 1980, 94 Stat. 1208 (1980), 29 U.S.C. §§ 1001-1461 (Supp. V 1981) ("MPPAA"). *Carpenters Pension Trust for Southern California v. Shelter Framing Corp.* is still pending before this Court. G & R has already appeared as an *amicus curiae* in this case with regard to the consideration of the jurisdictional statements.

A claim for withdrawal liability has been assessed against G & R in the amount of \$687,387. With regard to G & R, the trial court declared and the court of appeals affirmed that the retroactive imposition of withdrawal liability against G & R and another employer, Shelter Framing Corporation, under MPPAA was unconstitutional under the fifth amendment to the Constitution of the United States. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir. 1983). In the same decision, the court of appeals reversed the trial court ruling in R.A. Gray & Company's ("Gray") case. G & R will therefore be substantially affected by the Court's ultimate decision in this case.

STATEMENT OF G & R'S CASE

The material facts underlying G & R's constitutional challenge to the imposition of withdrawal liability pursuant to MPPAA are undisputed. A stipulation in the trial court of pertinent facts is attached as an appendix.¹

From October, 1972 through July 1, 1980, G & R was bound to a collective bargaining agreement with the United Brotherhood of Carpenters and Joiners of America ("union"), which required contributions to the Carpenters Pension Trust for Southern California ("CPT") at a specified rate for each hour worked by its employees. (App. at 1a, 2a) CPT was formed in 1959 pursuant to a trust agreement entered into between the union and several multiemployer associations. (App. at 1a) G & R has never been a member of any of those multiemployer associations. (App. at 5a-6a) G & R steadfastly abided by its collective bargaining agreement with the union and made all contractually required contributions to CPT. (App. at 5a)

At the time G & R entered into its collective bargaining relationship with the union, neither the Employee Retirement Income Security Act of

¹"App." refers to the appendix to G & R's brief *amicus curiae*.

1974, 88 Stat. 829 (1974), 29 U.S.C. §§ 1001-1381 (1976) ("ERISA"), nor MPPAA was in effect.² At no time was G & R free to withdraw its participation in CPT at will. G & R could withdraw its participation in CPT only by giving timely notice of termination in accordance with the terms of the appropriate collective bargaining agreement (App. at 3a), and after satisfying its bargaining obligation under the National Labor Relations Act § 8(a)(5) and (d), 29 U.S.C. § 158(a)(5) and (d) (1976), as amended.³

ERISA was passed in 1974. Under ERISA, a termination insurance program was established to be administered by PBGC. Under that plan, certain benefits were to be guaranteed by PBGC if the assets of the terminated plan were insufficient to fully fund those benefits. See ERISA § 4022, 29 U.S.C. § 1322 (1976). An employer could withdraw from a pension plan without incurring any continuing obligation to that plan so long as the plan did not terminate within five years subsequent to withdrawal. Even then, a withdrawn employer was only required to reimburse PBGC for amounts it had to pay under the benefit guaranty provisions of ERISA. These guaranteed amounts did not necessarily reach the full extent of the pension promises made by the pension plan. A withdrawn employer's liability was further limited to thirty percent of its net worth.

ERISA had no retroactive application. The major provisions of that law took effect on September 2, 1974, its enactment date. ERISA § 4201, 29 U.S.C. § 1381 (1976). Although ERISA was concerned chiefly with protecting the employees' pension expectations, it also realized that employers could not create, maintain, or expand pension plans if the

²"MPPAA §" refers to sections of ERISA as amended by MPPAA. "ERISA §" refers to provisions of ERISA prior to the passage of MPPAA. "PBGC brief" refers to Pension Benefit Guaranty Corporation's brief on the merits in these cases. "Carpenters' Pension Fund brief" refers to the brief on the merits of the Oregon-Washington Carpenters-Employers Pension Trust Fund.

³The withdrawal liability provisions of MPPAA are triggered when a participating employer ceases to have an obligation to contribute to a multiemployer pension plan. See MPPAA § 4203, 29 U.S.C. § 1383 (Supp. V 1981). The Court will note that the term "obligation to contribute" under MPPAA means an obligation arising (1) "under one or more collective bargaining (or related) agreements" or (2) "as a result of a duty under applicable labor-management relations law. . . ." MPPAA § 4212(a), 29 U.S.C. § 1392(a) (Supp. V 1981). An employer's obligation to continue to make trust fund contributions, including pension contributions, until it has satisfied its statutory bargaining obligation despite the expiration of its collective bargaining agreement is well established. *E.g.*, *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981).

costs imposed by ERISA were too high. Thus, ERISA contained many provisions which were designed to ameliorate the hardship to employers which included:

- (1) A ceiling on an employer's liability at thirty percent of its net worth, ERISA § 4062(b)(2), 29 U.S.C. § 1362(b)(2) (1976);
- (2) A limitation on the amount of benefits which PBGC would guarantee, ERISA § 4022(b)(3), 29 U.S.C. § 1322(b)(3) (1976);
- (3) A phase-in of the amount of benefits to be guaranteed from plan amendments, ERISA § 4022(b)(8), 29 U.S.C. § 1322(b)(8) (1976);
- (4) An authorization to PBGC to offer insurance to employers against contingent withdrawal liability with low insurance premiums, ERISA §§ 4006 and 4023(a), 29 U.S.C. §§ 1306 and 1323(a) (1976); and
- (5) A grant of authority to PBGC to waive or reduce the liability imposed under the termination insurance provisions of ERISA during the first nine months after ERISA's effective date to avoid unreasonable business hardship "in any case in which the employer was not able, as a practical matter, to continue the plan," ERISA § 4004(f), 29 U.S.C. § 1304(f) (1976).

The termination insurance provisions of ERISA did not apply to multiemployer pension plans until August 1, 1980. Pub.L.No. 96-293, 94 Stat. 610 (June 30, 1980). See PBGC brief at 6 n. 6, 12.

After ERISA's passage, the trust agreement establishing CPT was revised. The trust agreement, in pertinent part, guaranteed employers that they would not be liable or responsible for any debts, liabilities or obligations of CPT or its trustees, and it expressly limited the employer's financial obligation:

[T]o the payments required by the collective bargaining agreement with respect to his or its individual or joint venture operation, and . . . Individual Employers shall not be required to make any further payments or Contributions to the cost or operation of the fund or the pension plan except as may hereinafter be provided in the Collective Bargaining Agreements.

The last collective bargaining agreement to which G & R was signatory expired July 1, 1980. (App. at 3a) That agreement required that

notice to terminate be given at least sixty days prior to June 15, 1980, or no later than April 15, 1980. (App. at 3a) Like the trust agreement, the collective bargaining agreement provided:

The parties recognize and agree that the Pension Trust was created, negotiated and shall continue to be a defined contribution plan and trust and that the individual Contractor's liability with regard to pensions has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

Pension benefit levels are determined solely by the trustees of CPT. At no material time has any shareholder, officer, director, agent or representative of G & R participated in: (a) investment decisions pertaining to any assets of CPT; (b) decisions of CPT to raise pension benefit levels; (c) decisions affecting CPT's administrative costs; or (d) the selection of actuarial assumptions or methods or accounting principles with which G & R's asserted withdrawal liability has been calculated. (App. at 5a) As a matter of law, the CPT trustees' sole obligation is to the beneficiaries of the pension fund and that obligation is a fiduciary one. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

On or about April 8, 1980, G & R sent the union a notice to terminate its collective bargaining agreement. (App. at 3a) G & R's agreement expired effective July 1, 1980. After an impasse in negotiations was reached on July 18, 1980, G & R ceased having an obligation to contribute to CPT. (*Id.*)

At that time, Congress was in a state of utter confusion about the legislative bill which became MPPAA. As late as August, 1980, after G & R had withdrawn, one Senator lamented: "There are few, if any, members of the House or Senate who can confidently state how this bill will operate." 126 Cong. Rec. S10520 (daily ed. August 1, 1980) (statement of Sen. Durenberger) (App. at 11a). During the month of July, 1980, after the expiration of G & R's collective bargaining agreement, numerous and significant changes were made in MPPAA. 126 Cong. Rec. S10167 (daily ed. July 29, 1980) (statement of Sen. Armstrong) (App. at 8a-11a).

If MPPAA had been in effect at the date of its withdrawal, the record shows that G & R would have exercised several options which would have avoided or substantially reduced its withdrawal liability exposure. Those alternatives included selling its business or going out of business entirely.

MPPAA was enacted on September 26, 1980, after G & R ceased having an obligation to contribute to CPT. The withdrawal liability provisions of MPPAA were made retroactive to withdrawals which occurred on or after April 29, 1980. MPPAA § 4402(e)(2)(A), 29 U.S.C. § 1461(e)(2)(A) (Supp. V 1981). When originally introduced in February, 1979, the bill which became MPPAA was to have an effective date of February 27, 1979. The effective date of the withdrawal liability provisions was delayed solely in response to strong political pressures exerted by certain unidentified employers who were caught by the earlier date. Congress recognized, however, that permitting those employers to avoid withdrawal liability served to increase the burden placed upon remaining employers. 126 Cong.Rec. S10101, 10157 (daily ed. July 29, 1980) (statements of Sen. Javits and Sen. Matsunaga) (App. at 7a, 8a).

On or about September 2, 1981, CPT notified G & R of the amount of its withdrawal liability assessment and demanded payment in accordance with a prescribed schedule. (App. at 3a-4a) G & R's withdrawal liability was computed pursuant to MPPAA § 4211(b)(1)(B) and (3), 29 U.S.C. § 1391(b)(1)(B) and (3) (Supp. V 1981), which was the same method used to compute Gray's withdrawal liability.

With regard to withdrawal liability assessments, the term "unfunded vested benefits" is equivalent to the difference between the present value of the nonforfeitable benefits under the plan and the present value of the plan's assets. MPPAA § 4213(c), 29 U.S.C. § 1393(c) (Supp. V 1981). A "nonforfeitable benefit" is a benefit to which a participant (employee) is entitled to by virtue of having satisfied the requirements of the plan or of ERISA. MPPAA § 4001(a)(8), 29 U.S.C. 1301(a)(8) (Supp. V 1981).⁴

The total amount of G & R's withdrawal liability assessment is \$687,387 (App. at 3a, 4a), which purportedly represents G & R's proportionate share of CPT's claimed unfunded vested liability as of December 31, 1979 in the amount of \$282,854,000. The withdrawal liability claim

⁴Withdrawal liability is computed based upon the total vested pension entitlement of an employee under a pension plan. It is not computed from the level of benefits guaranteed by PBGC as under ERISA.

asserted against G & R is not based upon any claimed breach of a collective bargaining agreement. (App. at 5a) It is not based upon any need for payment of benefits to any particular present or former employee of G & R. The unfunded vested benefit liability has not been generated because of the retirement of any former or current employee of G & R. (*Id.*)

If CPT's claim were paid outright, MPPAA will have appropriated forty percent of G & R's net worth. If G & R elected to pay monthly installments of \$17,397.83 as computed pursuant to MPPAA § 4219(c)(1)(C), 29 U.S.C. § 1399(c)(1)(C) (Supp. V 1981), MPPAA will have consumed ninety-four percent of G & R's net income for its fiscal year 1981.

Conversely, G & R's withdrawal liability assessment amounts to .00243 of CPT's claimed unfunded vested liability. CPT is in no danger of insolvency. *Shelter Framing Corp.*, 543 F.Supp. at 1250.

SUMMARY OF ARGUMENT

It is a rudimentary jurisprudential principle that laws are enacted for the future and do not operate on acts which predate their passage. This Court has never endorsed the application of the minimal, rational basis standard of judicial review in assessing the constitutionality of legislation which is retroactive either in its application or in effect. The appropriate standard of review to be employed in reviewing MPPAA's retroactive application to withdrawals which occurred prior to its date of enactment but subsequent to its retrospective effective date is that used by the Ninth Circuit -- whether MPPAA is applied retroactively was so wholly unexpected and disruptive that harsh and oppressive consequences followed. Applying this standard necessarily calls for the weighing of the withdrawn employers' reliance interests, the equities of imposing the additional unanticipated burden, and meaningful legislative efforts to soften the statute's impact.

Applying the correct standard of review to this case, MPPAA is unconstitutional. MPPAA nullifies the protection of limitation upon liability clauses in collective bargaining and trust agreements which were *encouraged* by ERISA to induce the creation and growth of pension plans. Its retroactive application obliterates withdrawn employers' reasonable reliance upon the state of the law at the time of withdrawal

which imposed no liability (only a possible contingent liability). They had no obligation to foresee MPPAA's final form.

No equitable considerations favor foisting massive and unforeseeable withdrawal liability upon employers who withdrew during the retrospective period. Employees had no reasonable expectation of continued funding of pension promises made by the pension trust funds from these employers as Gray and G & R explicitly disclaimed any obligation to fund the pension plans beyond the schedule of contributions required by the collective bargaining agreements. The total absence of meaningful moderating provisions in MPPAA demonstrates that there was no effort to soften MPPAA's impact in the area where the employer's element of reliance was greatest.

ARGUMENT

I

An Exposé of Fallacies Advanced by PBGC

PBGC has advanced several arguments which are intended to play upon this Court's sympathies in reviewing the constitutionality of the retroactive application of MPPAA. G & R will show that many of these contentions are deceptive and misleading.

- 1. Withdrawal liability is needed to assure that withdrawn employers continue to fund vested pension benefits earned by *their* employees.**

PBGC has argued that withdrawal liability under MPPAA is needed to assure that employers who cease to participate in multiemployer pension plans continue to fund pension benefits earned by *their* employees. PBGC brief at 19, 30. This proposition is incorrect.

Both G & R (App. at 2a) and Gray are employers primarily engaged in the building and construction industry. The defendant multiemployer pension plans, CPT (App. at 1a) and Oregon-Washington Carpenters-Employers Pension Trust Fund ("Carpenters' Pension Fund"), primarily cover employees in the building and construction industry. G & R's and Gray's withdrawal liability assessments were, therefore, computed

pursuant to MPPAA § 4211(b), 29 U.S.C. § 1391(b) (Supp. V 1981). MPPAA § 4211(c)(1), 29 U.S.C. § 1391(c)(1) (Supp. V 1981).

Under Section 4211(b)(1), withdrawal liability is allocated based upon the withdrawn employer's proportionate share of the multiemployer pension plan's gross unfunded vested liability. Withdrawal liability is *not* necessarily computed based upon the retirement of any particular current or former employee of the withdrawn employer. Nor is it limited to the necessity to fund the vested pension rights of any current or former employee of the withdrawn employer. This point was conceded by CPT in the district court in the *G & R* case. (App. at 5a)

Under MPPAA, all the employers contributing to multiemployer pension plans are collectivized and treated as a single employer for purposes of funding a trust fund's vested pension obligations. Employers like *G & R* are required to fund the pensions of employees it never employed, to carry the burden of insolvent employers, to fund pension credits received by employees when contributions were not being made on their behalf (known as past service credits), and to assume a share of the unfunded liability directly attributable to the employees of employers who withdrew from the multiemployer pension plan prior to MPPAA's passage.¹

PBGC's misleading description as to how withdrawal liability is allocated under MPPAA is more than a mere oversight. This Court in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 355-61 (1935), invalidated similar provisions of the Railroad Retirement Act, finding them to be inconsistent with the fifth amendment's due process

¹Although not at issue here, one element of the withdrawal liability computation is a withdrawn employer's proportionate share of the unamortized amount of reallocated unfunded vested benefits. MPPAA § 4211(b)(1)(C), 29 U.S.C. § 1391(b)(1)(C) (Supp. V 1981). Unfunded vested liability is reallocated when the pension plan determines that any amount assessable against another employer is uncollectible by reason of the operation of the bankruptcy laws or similar proceedings; or as a result of the operation of the *de minimis* rule [MPPAA § 4209, 29 U.S.C. § 1389 (Supp. V 1981)], the twenty year cap upon the payment of withdrawal liability [MPPAA § 4219(c)(1)(B), 29 U.S.C. § 1399(c)(1)(B) (Supp. V 1981)], the limitation on withdrawal liability assessments rising from a sale of the employer's assets or an employer's dissolution or liquidation [MPPAA § 4225, 29 U.S.C. § 1405 (Supp. V 1981)], or any other amount the trust fund determines to be uncollectible or unassessable for reasons not inconsistent with regulations yet to be prescribed by PBGC. MPPAA § 4211(b)(4)(B), 29 U.S.C. § 1391(b)(4)(B) (Supp. V 1981).

guarantee because they were "unreasonably and unconscionably burdensome and oppressive." *Id.* at 360.⁶

2. MPPAA's retroactive effective date was needed to prevent mass withdrawals.

It is argued throughout PBGC's brief that MPPAA's retroactive date of April 29, 1980 was necessary to prevent mass withdrawals from multiemployer pension plans while MPPAA was in its formative stages. PBGC brief at 11, 17, 30-31. PBGC's contention is incorrect.

The withdrawal liability provisions of MPPAA apply to multiemployer pension plans created pursuant to collective bargaining agreements. MPPAA § 4001(a)(3), 29 U.S.C. § 1301(a)(3) (Supp. V 1981). The collective bargaining agreement containing the obligation to contribute to a multiemployer pension plan cannot be terminated at will. *Shelter Framing Corp.*, 543 F.Supp. at 1254. Rather, notice of termination must be given in accordance with the termination provisions of the collective bargaining agreement and National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976), as amended. Upon termination after proper notice, an employer is not free to cease making pension contributions until after it has satisfied its statutory obligation to bargain and an impasse in negotiations has been reached. Mass withdrawals at will were impossible.

MPPAA's claimed deterrent effect, moreover, is irrelevant to assessing its constitutionality on due process grounds. In *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976), upon which both PBGC and the Carpenters' Pension Fund rely as dispositive authority, this Court stated that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness." (citations omitted).

⁶Similar reason was employed in *Pension Benefit Guaranty Corp. v. Anthony Co.*, 537 F.Supp. 1048, 1053-57, *supplemented*, 542 F.Supp. 43 (N.D. Ill. 1983), to prevent PBGC from recovering vested but unfunded benefits from a parent corporation which acquired its interest before ERISA's effective date absent a showing of direct economic benefit to the parent company from pension plan underfunding.

3. Congress selected the April 29, 1980 retrospective date to insure fairness.

In an effort to rewrite MPPAA's legislative history, PBGC argues that Congress chose April 29, 1980 as the effective date for the imposition of withdrawal liability out of a sense of fairness. PBGC brief 11-12, 39. As originally proposed, MPPAA was to have a retroactive effective date of February 27, 1979. The date was moved to April 29, 1980 because of strong pressure from politically powerful employers who had been caught by that earlier retroactive date. The retroactive effective date was advanced even though the withdrawal liability attributable to those employers would be visited upon the employers remaining with the plans in question, which, to quote PBGC, "[was] the very harm the law was designed to prevent." PBGC brief at 19-20. 126 Cong.Rec. S10101, 10157 (daily ed. July 29, 1980) (statements of Sen. Javits and Sen. Matsunaga) (App. at 7a, 8a).

The legislative history referred to above illustrates why retroactive legislation is viewed with disdain. Retroactive laws may be passed with knowledge of the precise conditions under which they will apply and of the persons on whom will fall whatever burdens may be imposed. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 693 (1960) ("Hochman"). While one may argue that the advancement of the retroactive effective date of MPPAA was simply the outcome of normal legislative processes, the arbitrary selection of April 29, 1980 as the retroactive effective date of MPPAA is not consistent with the constitutional limitations which stand as bulwarks against majoritarian influences. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

II

MPPAA's Retroactive Application Violates Due Process

1. The appropriate standard of review.

In finding that MPPAA's retroactive application to employers who withdrew from multiemployer pension plans prior to the statute's enactment date violated due process, the Ninth Circuit applied the rationality standard set forth in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on statutory grounds only*, 446 U.S.

359 (1980), which tests whether a retroactive law is unduly harsh and oppressive based upon the weighing of several factors. The Fourth Circuit and the Seventh Circuit have also applied the *Nachman* standard in evaluating the constitutionality of MPPAA's retroactive application, although those courts found that MPPAA's retroactive application survived a due process attack. *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081 (7th Cir. Dec. 19, 1983); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983).⁷

⁷In *Peick*, the court applied the "arbitrary and irrational" standard of review under *Turner Elkhorn Mining Co.* to a due process challenge to MPPAA's prospective operation, finding that the *Nachman* approach presented a more heightened level of judicial scrutiny. *Peick*, slip op. at 27-31. But in evaluating the constitutionality of MPPAA's retroactive application, the court recognized that a different standard of review was required, again based upon this Court's *Turner Elkhorn Mining Co.* decision, which examines whether the imposition of liability during the retroactive period was harsh or oppressive. *Id.*, slip op. at 38-39; accord *Shelter Framing Corp.*, 705 F.2d at 1510. The Seventh Circuit specifically recognized that this heightened level of scrutiny approached the type of analysis utilized in *Nachman*. *Id.*, slip op. at 39 n. 25. Thus, all of the courts of appeals which have considered the constitutionality of MPPAA's retroactive application have rejected PBGC's and the Carpenters' Pension Fund's assertion that rationality is to be tested by the traditional due process analysis applied to prospective legislation. PBGC brief at 20-23; Carpenters' Pension Fund brief at 20-22 & n.4.

The precedential value of *Republic Industries, Inc.* and *Peick* is doubtful. In *Republic Industries, Inc.* the withdrawal liability assessed relates to the closing of a terminal which the company contends occurred prior to MPPAA's effective date of April 29, 1980. *Republic Industries, Inc.*, 718 F.2d at 633-34. Under MPPAA § 4217(a)(2), 29 U.S.C. § 1397(a)(2) (Supp. V 1981), a "facility" at which all covered operations permanently cease before April 29, 1980, or for which there was a permanent cessation of the obligation to contribution to a multiemployer pension plan before that date, is not taken into account in assessing complete or partial withdrawal liability. The employer thus has a complete statutory defense to the imposition of withdrawal liability. Under the cardinal principal that courts should not pass upon questions of constitutionality where a statutory question might be dispositive, the Fourth Circuit should not have considered the challenge to the retroactive application of MPPAA prior to resolving the statutory claim. *E.g.*, *New York Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

Curiously, the Seventh Circuit in *Peick* relies heavily upon the *Republic Industries, Inc.* decision even though it refused to consider the constitutionality of MPPAA in a case decided on the same day as *Peick* because nonconstitutional issues may have been dispositive. *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 83-2026 (7th Cir. Dec. 19, 1983). The Court explicitly recognized that its *Transport Motor Express, Inc.* decision conflicts with the Fourth Circuit's decision in *Republic Industries, Inc.* *Id.*, slip op. at 6 n.3. Similarly, in *Peick*, there is substantial doubt as to whether there exists a justiciable challenge to the constitutionality of MPPAA, rendering the Seventh Circuit's decision nothing more than an advisory opinion. *Peick*, slip op. at 56-59 (Eachbach, J., dissenting).

PBGC implicitly and the Carpenters' Pension Fund explicitly (Carpenters' Pension Fund brief at 22 n.4) reject *Nachman* as controlling authority. This is not, however, the position taken by PBGC and the Carpenters' Pension Fund before the Ninth Circuit. Both argued that *Nachman* articulated the proper standard for assessing the rationality of MPPAA's retroactive application. See Carpenters Trust Fund's brief to the Ninth Circuit in Case No. 82-3506 at 12 and PBGC's brief to the Ninth Circuit in Case No. 82-3506 at 3-9. PBGC, in fact, argued that this Court had endorsed the *Nachman* rational *sub silentio* when it reviewed the *Nachman* decision on statutory grounds only. *Id.* at 4 n.4.

It is not surprising that PBGC and the Carpenters' Pension Fund are trying to place distance between *Nachman* and their arguments. The *Nachman* standard is derived from prior decisions of this Court applying the prohibition against statutes impairing the obligation of contracts under U.S. Const. art. I, § 10, cl. 1. As this Court, the Seventh Circuit in *Nachman*, and commentators have recognized, there is a tendency for decisions under the contract and the due process clauses to coalesce. Challenges under those limitations on legislative action can be analyzed under the standard of whether there has been a reasonable or unreasonable deprivation of property. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *Nachman*, 592 F.2d at 959; *Hochman*, 73 Harv.L.Rev. at 695; Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv.L.Rev. 852, 890-91 (1944).

G & R agrees that *Nachman* factually has only limited application here. See *Shelter Framing Corp.*, 705 F.2d at 1511-12. Comparing ERISA as applied in *Nachman* to MPPAA as applied to these employers, however, serves to highlight the harsh and oppressive nature of the imposition of these massive unforeseeable monetary obligations.

In *Nachman*, the court assessed the constitutionality of ERISA's termination insurance program, the forerunner of withdrawal liability. The termination insurance provisions of ERISA applied prospectively only, although they served to nullify express limitations upon employer liability to contribute additional funding to underfunded pension plans. 592 F.2d at 958.

In Gray's case and in G & R's case, MPPAA not only has a retroactive effect of invalidating limitation upon liability clauses, but Congress has reached back to impose an unanticipated burden upon transactions which were completed prior to MPPAA's enactment. MPPAA's

retroactive effective date is a classic *ex post facto* law which would be facially unconstitutional but for this Court's 1798 decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

The bias against retroactive laws is an ancient one going back to the time of the ancient Greeks. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn.L.Rev. 775, 775-78 (1936) ("Smead").

There are few principles of our law more ancient, and none more respected, than the canon which holds that laws are enacted for the future. A legislative pronouncement may not operate on acts which predate its passage.

South East Chicago Commission v. Department of Housing & Urban Development, 488 F.2d 1119, 1122 (7th Cir. 1973).

The most fundamental reason why retroactive legislation is suspect "stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences." *Hochman*, 73 Harv.L.Rev. at 692. This principle is closely allied to the reasons why the Constitution places a high value on the protection of private contracts. "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Spannaus*, 438 U.S. at 245.

As discussed previously, another circumstance which clouds retroactive legislation is that such laws can be passed with knowledge of the precise conditions to which they will apply and of the persons on whom will fall the burdens they impose. A law for the future is impersonal; whereas a law for the past may be personal. Prospective legislation is better suited for an evenhanded and impartial administration of justice. *Hochman*, 73 Harv.L.Rev. at 693.

Despite PBGC's belabored effort to present a case for the minimal, rational basis standard, a careful review of the controlling authorities rational basis standard, a careful review of the controlling authorities confirms that judicial review of retroactive legislation is heightened. The appropriate standard is that which was employed by the Ninth Circuit; i.e., whether the retroactive law "is so wholly unexpected and disruptive that harsh and oppressive consequences follow." *Shelley Framing*

Corp., 705 F.2d 1510 (quoting *Hazelwood Chronic Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated on other grounds*, 530 U.S. 952 (1977)); accord *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Spannaus*, 438 U.S. at 245 ("The severity of the impairment measures the height of the hurdle the . . . legislation must clear"); *Peick*, *slip op.* at 38; *Hochman*, 73 Harv.L.Rev. at 706.

This standard which tests the strength of the reliance interest ("wholly unexpected") and the severity of its impact ("harsh and oppressive consequences") necessarily subsumes the *Nachman* factors. Because the backdating of a statute is necessarily arbitrary and imposes a wholly unanticipated obligation depriving the persons affected of any meaningful opportunity to conform their conduct to the law's requirements, retroactively applied statutes are generally violative of due process. *E.g.*, *Untermeyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).¹

This rule is consistent with *Turner Elkhorn Mining Co.* While *Turner Elkhorn Mining Co.* reviewed prospective legislation having retroactive effects under a rationality standard, that standard was tempered with the caveat that retroactive legislation is subject to a higher standard of judicial review. 428 U.S. at 16-17. The justification for retrospective imposition of liability must take into account the possibility that the person affected may not have been aware of the problem which prompted the passage of the legislation. Even if the person affected was aware of the problem, courts must consider whether the conduct may have been taken in reliance upon the state of the law at that time, which imposed no liability. *Id.* at 17; *Shelter Framing Corp.*, 705 F.2d at 1511. This aspect of *Turner Elkhorn Mining Co.* tests the strength of the reliance interest of the person affected by the retroactive legislation.

Turner Elkhorn Mining Co. also teaches that the equity of imposing the retroactive burden and any legislative efforts to moderate the impact of the unforeseen additional liability must be considered. There, the

¹The only apparent exception to this rule is in the area of income taxation. As the *Shelter Framing Corp.* district court correctly analyzed, income tax statutes in this area are *sui generis*. 543 F.Supp. at 1251-52; accord *Welch v. Henry*, 305 U.S. at 146-47; *Hochman*, 73 Harv.L.Rev. at 706; *Smead*, 20 Minn.L.Rev. at 796. As this Court explained in *U.S. v. Darusmont*, 449 U.S. 292, 297-98 (1981) (*per curiam*), taxation is neither a penalty on the taxpayer nor a liability assumed by contract.

Court sustained the constitutionality of a statute requiring companies to pay black lung benefits to their employees who had left the industry prior to its enactment. The Court found that the imposition of liability was a "rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers." *Id.* at 18. The Court distinguished *Alton* on the basis that the black lung benefit provisions did not simply increase or supplement a former employee's salary to meet his generalized need for funds. The statute was upheld because its purpose was to satisfy a specific need created "by the dangerous conditions under which the former employee labored to allocate to the mine operator an actual, measurable cost of his business." *Id.* at 19.

The Court was also influenced by the fact that a substantial portion of the burden for black lung benefits stemming from the period prior to the statute's enactment was borne by the government, which of course moderated the statute's retroactive impact upon the mine operators. *Id.* at 18; *Shelter Framing Corp.*, 543 F.Supp. at 1253.⁹

The federal Coal Mine Health and Safety Act was enacted on December 30, 1969, and provided in part for the payment of benefits to miners afflicted with irreversable black lung disease and their survivors. Claims filed under that statute between December 30, 1969 and June 30, 1973 were paid by the United States. Claims filed after December 31, 1973 were paid by the mine operator. Claims filed between July 1, and December 31, 1973 were adjudicated by the Secretary of Labor with the United States being responsible for the payment of any benefits until December 31, 1973. 428 U.S. at 12-13.¹⁰

⁹In fact, some of the parties contended that it was likely that the mine operators would not be liable for any disabilities maturing before the statute's enactment. See *id.* at 16 n.14.

¹⁰The factors which lead the Court to uphold the statute in *Turner Elkhorn Mining Co.* are not significantly different from the *Nachman* factors. The factor which tests whether the impairment of the private interest is affected in an area previously subjected to regulatory control is merely another element of testing the strength of the reliance interest. *Shelter Framing Corp.*, 705 F.2d at 1512; accord *Carpenters' Pension Fund* brief at 21. When dealing with a retroactively applied statute, the fact that the parties may have been doing business in an area subject to federal regulatory control is of little significance. The plaintiffs in these cases had an absolute right to rely upon the state of the law at the time they withdrew from multiemployer pension plans and had no obligation to foresee the outcome of the formative legislation which became MPPAA. *Infra* at 22-28; 705 F.2d at 1511.

The dissenting opinion in *Spannaus* is also instructive in assessing this Court's attitude toward retrospective legislation. The dissenting justices reached the question of whether the Minnesota statute at issue there violated due process.

Briefly, in *Spannaus*, a majority of the Court struck down a Minnesota statute which, like MPPAA, retroactively imposed minimum funding and vesting standards on certain pension plans and held the employers to account for any fund deficiencies upon termination of the plan. The statute was held to be unconstitutional under the contract clause although the employer did not decide to terminate operations in Minnesota, which triggered the liability, until after the statute was passed. 438 U.S. at 238-39. The pension plan at issue in *Spannaus* was a single employer plan, and was not created pursuant to any collective bargaining agreement. *Id.* at 236 & n.2.

Dissenting Justices Brennan, White, and Marshall found that the contract clause was inapplicable. *Id.* at 255-62. The dissenting justices also found that the Minnesota statute did not violate the due process clause of the fourteenth amendment, relying primarily upon *Turner Elkhorn Mining Co.* *Id.* at 262-64. Particular emphasis was placed upon the fact that the Minnesota statute did not impose a sudden and unanticipated liability because the Act operated prospectively to plant closures which occurred after the statute's enactment date. This enabled the employer to give full consideration to the economic consequences of the decision. *Id.* at 254, 264. From an equitable perspective, the dissent was also concerned about the possible windfall from the use of surplus contributions for employees whose pensions had not vested to offset future contributions for employees whose pensions had vested. *Id.*

**2. Applying the appropriate standard of judicial review,
MPPAA's retroactive application violates due process.**

Applying the factors discussed above, MPPAA is unduly harsh and oppressive. There are two elements to Gray's and G & R's reliance -- the state of the law and the limitation upon liability clauses. As this Court has already recognized, the element of reliance when funding a pension plan is vital. *Spannaus*, 438 U.S. at 246-47 (quoting *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978)).

There was no showing in G & R's case that G & R was aware that its pension trust fund contributions since October, 1972 had been insufficient to fully fund CPT's vested pension obligations. On the contrary, the pertinent collective bargaining agreements to which G & R was signatory and the public records filed by CPT with the Internal Revenue Service as late as July, 1980 described CPT as a defined *contribution* plan to which neither the termination insurance provisions of ERISA nor the withdrawal liability provisions of MPPAA apply. ERISA § 4021(b), 29 U.S.C. § 1321(b) (1976). CPT further admitted in the district court that it never advised contributing employers that it was a defined benefit plan to which the termination insurance provisions of ERISA and the withdrawal liability provisions of MPPAA would apply. In any event, at the time of its withdrawal, G & R was subject to at most a thirty percent contingent liability based upon the level of benefits guaranteed by PBGC.¹¹

Prior to ERISA's passage, limitation upon liability clauses presented an absolute bar to the recovery of additional contributions beyond those required to be made under a collective bargaining agreement, even if a pension plan was terminated with insufficient assets to fund pensions earned. *United Steelworkers of America v. Crane Co.*, 605 F.2d 714, 717-19 (3rd Cir. 1974). After the passage of ERISA, limitations upon liability clauses still protected employers from additional funding obligations upon withdrawal except where PBGC guaranteed certain benefit levels under terminated or insolvent plans within five years of the withdrawal. See *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237-39 (3rd Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).

Assuming that G & R or Gray were aware that the plans were underfunded, they reasonably relied upon the state of the law in making the business decision to withdraw from the multiemployer pension plan. In G & R's case, ERISA imposed no immediate obligation to fund CPT as CPT was not insolvent and was not in danger of termination. ERISA did not intend to outlaw the limitation upon liability clauses. As this Court noted in *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 385

¹¹In Gray's case, the date of withdrawal is pinpointed as June 1, 1980. Carpenters' Pension Fund brief at 4-5. As PBGC concedes, the mandatory termination insurance provisions of ERISA did not apply to multiemployer pension plans until August 1, 1980. PBGC brief at 6 n.6. It can be argued that the disclaimer of liability clause rendered Gray's potential liability doubly contingent. The pension plan had to terminate within five years of Gray's withdrawal and PBGC had to exercise its discretion to guarantee a portion of the unfunded liability.

n.35 (1980), "since [the use of limitation upon liability clauses] has unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeated expressed intent to encourage the maintenance of pension plans." The disclaimer of liability clauses together with the thirty percent limitation upon the amount of liability collectible from an employer (along with other measures) soften ERISA's impact so as to encourage the creation and growth of such plans. *Nachman*, 446 U.S. at 380 n.30.

To allow MPPAA to now nullify the expectations created by ERISA that disclaimer of liability clauses would be respected and that an employer's potential liability to the pension plan would be limited to thirty percent of its net worth would be pernicious and arbitrary. "Wherever expectations have been raised in accordance with a declared purpose and concession of the state, . . . to disappoint those expectations by recall of the concession without a manifest preponderance of general utility is . . . pernicious." Smith, *Retroactive Laws and Vested Rights*, 6 Tex.L.Rev. 409, 427-28 (1928) (quoting 2 Austin, *Jurisprudence* § 1138 (1874)).

If G & R had known tht ERISA intended to nullify the limitation upon liability clauses beyond its original thirty percent contingent liability, G & R and other contributing employers could have: (1) not agreed to participate in CPT at all, (2) created a defined contribution plan (which was the party's intention under the pertinent collective bargaining agreements), or (3) attempt to confine narrowly the trustees' ability to set benefit levels higher than the value of the plan's assets. If MPPAA had been in effect at the time G & R withdrew, G & R could have sold its business to an employer who continued to contribute to CPT or G & R could have gone out of business completely, thereby incurring no withdrawal liability. *Shelter Framing Corp.*, 705 F.2d at 1511-12, 1514.

The equities and the lack of moderating features applicable to employers who withdrew during the retrospective period also argue against MPPAA's constitutionality. It is patently inequitable to impose an unanticipated and harsh liability upon a transaction which was completed prior to the passage of MPPAA. This is particularly true when viewed in light of the fact that the retroactive application of MPPAA was not necessary to forestall withdrawals and in light of the fact that the selection of April 29, 1980 as the effective date was purely arbitrary to mollify the interests of the politically powerful.

The inequity of imposing this harsh retroactive liability is further increased in that the employees could not justifiably rely upon G & R or Gray to provide additional funding for pensions. PBGC and the Carpenters' Pension Fund can point to no contractual provision which creates any expectation in the employees that employers such as G & R or Gray would continue to fund pensions. They agreed only to make pension contributions on behalf of their employees at specified hourly rates. G & R did not set the benefit levels. Those benefit levels were set by CPT. It was CPT, not G & R, who made promises of pension benefits at certain specified levels. *Shelter Framing Corp.*, 543 F.Supp. at 1250, 1252; see *Peick, slip op.* at 11. The bifurcation of the functions between contribution-setting and benefit-setting, together with the pension plan's ability to grant past service pension credits, are among the factors which account for and contribute to the creation of unfunded vested benefits. See 126 Cong.Rec. H7903 (daily ed. Aug. 26, 1980) (statement of Rep. Erlenborn); 126 Cong.Rec. S10103 (daily ed. July 29, 1980) (statement of Sen. Dole) (App. at 7a-8a, 11a-12a). Any employee's expectation of continued funding of pension promises was inextricably intertwined with the limitation upon liability clauses, thus foreclosing any reasonable expectation that he would receive more from participating employers.

These cases are strikingly similar to *Alton*, where the Court struck down a federal statute which created a compulsory multiemployer pension system for railroad employees. The Court unanimously held that the retroactive application of that statute to employees who had left the industry prior to its enactment violated due process. 295 U.S. at 348-50; *id.* at 389 (Hughes, C.J., dissenting). Like *Alton*, and unlike *Turner Elkhorn Mining Co.*, the provisions of MPPAA are designed to supplement an employee's generalized need for funds out of the assets of G & R even though G & R may never have employed the employee. If CPT were fully funded as represented to G & R through the trust agreements and the collective bargaining agreements, CPT could not make any claim for additional contributions from G & R because of G & R's withdrawal. It is only because CPT has made unauthorized promises which it apparently cannot keep that a claim for additional contributions has been made as authorized by MPPAA.

MPPAA is also devoid of any meaningful moderating features to lessen the harsh impact of MPPAA's retroactive application.¹² The

¹²The Seventh Circuit has recognized that a case can be made for the inadequacy of moderating provisions of MPPAA as retroactively applied. *Peick, slip op.* at 49.

district court decision in *Peick* listed several features of MPPAA which it considered to moderate the impact of that statute upon withdrawn employers. 539 F.Supp. at 1049-52.

Four aspects of MPPAA listed were not available to G & R because of its pre-enactment withdrawal. The withdrawal liability payment funds under MPPAA § 4223(c)(1)(C), 29 U.S.C. § 1403(c)(1)(C) (Supp. V 1981) and MPPAA § 4222, 29 U.S.C. § 1402 (Supp. V 1981), were not in effect when G & R withdrew. The liquidation or dissolution rules under MPPAA § 4225(b), 29 U.S.C. § 1405(b) (Supp. V 1981); the modified definition of withdrawal as applied to the building and construction industry under MPPAA § 4203(b)(2), 29 U.S.C. § 1383(b)(2) (Supp. V 1981); and the sale of assets rule under MPPAA § 4204, 29 U.S.C. § 1384 (Supp. V 1981), were not known to G & R at the time it withdrew.

The fact that G & R can make monthly installments in excess of \$17,000 as computed under MPPAA § 4219(c)(1)(C), 29 U.S.C. § 1399(c)(1)(C) (Supp. V 1981); and the fact that MPPAA puts a twenty-year cap on the amount of withdrawal liability which can be assessed does not moderate the impact of MPPAA as a practical matter.

The twenty-year cap is not only inapplicable to G & R, it is in the same category as the monthly installment payment provisions. Under MPPAA, G & R's annual payment equals \$208,773.96, which is ninety-four percent of its income for fiscal year 1981. The twenty-year cap rule would provide relief to G & R only if the withdrawal liability assessment exceeded \$4,175,479, more than twice G & R's 1981 net worth. *Shelter Framing Corp.*, 705 F.2d at 1514.

The *de minimis* rule, MPPAA § 4209, 29 U.S.C. § 1389 (Supp. V 1981), does not significantly moderate the impact of MPPAA. Because of the amount of withdrawal liability assessed against G & R, the *de minimis* rule has no application and thus cannot be considered. *Id.*

The ability to rejoin the pension plan under MPPAA § 4207, 29 U.S.C. § 1387 (Supp. V 1981), which was relied upon by the Seventh Circuit in *Peick*, *slip op.* at 40 n.26, is not a significant moderating feature. The ability to undo a transaction which was lawful and complete prior to the enactment of MPPAA is not a mitigating factor. *Shelter Framing Corp.*, 543 F.Supp. at 1254; *cf.*, *Fuentes v. Shevin*, 507 U.S. 67, 80-81 (1972) (where this Court refused to embrace the proposition that a wrong can be done if it can be undone). Section 4207 requires PBGC regulations to implement that provision. Although more than three years has

elapsed since MPPAA was enacted, no such regulations have been issued by PBGC. *Shelter Framing Corp.*, 705 F.2d at 1514. Additionally, CPT had not promulgated any such rules at the time the district court entered its decision, nor had CPT set forth in the *G & R* record the terms and conditions under which *G & R* could rejoin the plan and to what extent its withdrawal liability would be abated or diminished. The moderating impact of this aspect of MPPAA is purely speculative; and in effect asks withdrawn employers to accept the proverbial "pig in a poke."

Despite the presence of the asserted mitigating features of MPPAA, a fact which cannot be ignored is that *G & R* has been assessed withdrawal liability in the amount of \$687,387. *G & R*'s withdrawal liability assessment consumes forty percent of its net worth and threatens the economic future of its business. Its withdrawal liability assessment has not been reduced by one cent through the operation of any of the moderating features discussed above. This fact demonstrates that MPPAA in its retroactive application is devoid of moderating features designed to eliminate or ameliorate the crippling effect of that statute.

3. No person can be required to predict the outcome of formative legislation.

Both PBGC and the Carpenters' Pension Fund assert that Gray could not reasonably rely upon the law in effect at the time of its withdrawal in evaluating the consequences of that business decision. They argue that the pendency of the legislative proposal which became MPPAA presented Gray with adequate notice of possible withdrawal liability. The question as to whether Gray or *G & R* were required to foresee and conform their business judgments to the outcome of pending legislation is the central issue in this case, as PBGC acknowledges. PBGC brief at 35.

The court of appeals decisions which have considered the constitutionality of MPPAA in its retroactive application have pivoted in large measure on whether the employer could reasonably rely upon the state of the law at the time of withdrawal. Compare *Shelter Framing Corp.*, 705 F.2d at 1511, with *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d at 638, and *Peick v. Pension Benefit Guaranty Corp.*, slip op. at 39-40. The fact that the formative

legislation which became MPPAA was pending at the time of withdrawal is legally irrelevant to this Court's consideration of whether MPPAA's retroactive effective date passes constitutional muster. In *Untermeyer v. Anderson*, 276 U.S. at 445-46, this Court gave minimal consideration to this same argument and stated emphatically that there is no duty to foresee the outcome of pending legislative action.

The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from [*Blodgett v. Holden*] and to relieve the legislation of the *arbitrary character* there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes -- he cannot foresee and ought not be required to guess the outcome of pending measures. The future of every bill brought before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken.

(emphasis added). *Untermeyer* remains good law to this day.¹³

This Court implicitly reaffirmed that basic jurisprudential principle in *U.S. v. Security Industrial Bank*, ____ U.S. ____, 51 U.S.L.W. 4007 (1982). In that case, this Court held that Section 522(f) of the Bankruptcy Reform Act of 1978 does not apply to nonpossessory, nonpurchase-money liens created prior to the statute's enactment date. *Id.* at 4010. There was substantial doubt as to whether the retroactive destruction of such liens would comport with the taking clause of the fifth amendment. *Id.* at 4009.

In *In re Gifford*, 688 F.2d 447 (7th Cir. 1982) (*en banc*), the Seventh Circuit upheld the constitutionality of Section 522(f) against a challenge

¹³PBGC's reliance upon *U.S. v. Darusmont* is misplaced. PBGC brief at 36. *Darusmont* upheld the retroactive application of federal income tax legislation, and distinguished *Untermeyer* on that basis. 449 U.S. at 299. As previously discussed, income tax legislation in this area is *sui generis*. *Supra* at 15 n.8.

to its constitutionality under the taking clause. In considering the statute's interference with reasonable investment-backed expectations, the Seventh Circuit found that the creditor's expectations were insignificant because (among other things) the creditor knew or should have known at the time the security interest was created "that Congress was in the process of amending the bankruptcy laws to permit avoidance of such security interests." Amendments to the bankruptcy act had been in the process of enactment for almost a decade. 688 F.2d at 458 & nn.13 & 14.

In *Security Industrial Bank*, neither the majority nor the concurring justices (who would have upheld the constitutionality of the statute if the Court was writing on a "clean slate," 51 U.S.L.W. at 4011 (Blackmun, J., concurring)) considered the pendency of the Bankruptcy Reform Act as a factor in assessing the strength of the creditor's property interest. The Seventh Circuit's *en banc* decision in *In re Gifford*, however, was before the Court. See 51 U.S.L.W. at 4008 n.4.

PBGC's and the Carpenters' Pension Fund's argument essentially seeks to have this Court adopt the old, but discarded, English common law doctrine of relation, which held that an act of Parliament took effect as of the beginning of the session in which it had been enacted. See *Smead*, 20 Minn.L.Rev. at 779. American law never adopted that common law principle. *Id.* at 781. In fact, the English common law rule was abandoned by an act of Parliament based upon the manifest injustices the application of that rule had inflicted. 33 Geo. III, ch. 13 (1793). See also 1 J. Kent, *Commentaries on American Law*, 454-59 (1836).¹⁴

As this Court's *Untermeyer* decision cogently observed, the imputation of legislative prescience will impose an intolerable burden. In this case, the employers would have had to conform their business behavior based upon what might have been the outcome of the legislative struggle over MPPAA's retroactive effective date. They would have had to foresee that MPPAA in its final form would provide a special withdrawal liability rule for employers engaged in the building and construction industry, allowing them to avoid withdrawal liability by going out of business. They would also have had to foresee that there would be special

¹⁴Kent complained that the American rule which holds that a statute takes effect as of the date of its enactment was unfair because "[i]t is impossible, in any state, and particularly in such a wide-spread dominion as the United States, to have notice of the law, until sometime after it has passed." *Id.* at 457-58.

withdrawal liability rules for employers who sold their business to companies which continued to participate in the multiemployer pension plans. This was impossible. See *Shelter Framing Corp.*, 705 F.3d at 1514.

At the time these employers withdrew not even the legislators themselves could have predicted MPPAA's final form, as the bill was undergoing numerous alterations. *Shelter Framing Corp.*, 705 F.2d at 1511. As one senator angrily complained:

Mr. President, this is an extremely complicated piece of legislation. Every word of this bill is subject to interpretation by the IRS, the courts, the Department of Labor, and by hoards of lawyers in the private sector.

On this bill rests the financial future not only of many of America's largest corporations and pension plans, but also of thousands upon thousands of American workers.

And there is no committee report.

I think it is irresponsible to those persons whose futures depend on this legislation for us to act without such a report.

We almost passed this bill 30 days ago. Were it not for the quick action by some of my colleagues on this side of the aisle who put a hold on this bill, it might well have been passed 30 days ago as reported by the Labor Committee.

Over the objections of the managers of the bill, a 30-day extension was sought and finally agreed to.

I suppose it is a good thing that extension took place, since the managers of the bill have done much patchup work on it since then. Senators may not realize that this bill has been amended, altered, changed, and otherwise fiddled with no less than 335 times since it was reported out of the Labor Committee; 335 changes have been made in the bill that we almost passed 30 days ago.

This is the bill that was not even available to be put in front of Senators around the markup table in the Labor Committee. The record shows that Senator Schweiker railed up and down about how silly it was to try to mark up a bill with less than one-half of it in front of him.

Yet the markup pressed on, with Senator Schweiker being admonished about how hard staff had worked on the bill and about how every word had been gone over time

after time and that it was nearly perfect.

Nearly perfect except for the 335 changes that staff made in it in the past 30 days, that is. And I am told they have a raft of additional amendments today.

Where do these amendments come from? Well, certainly, several of them are quite technical in nature, only changing a word here or there, or, changing an "and" to an "or" and such. In fact over 300 such little improvements were suggested by no less than the Pension Benefit Guaranty Corporation, the Internal Revenue Service, and the Treasury Department.

Mr. President, I wish only to make a simple point. The U.S. Senate can ill afford to legislate in this sloppy manner. No bill for markup. No committee report. No 3-day rule for Senators to consider this legislation.

We are constantly told, "Let staff handle this," or "Staff will study this and work out the details." Well, I am very happy that we have such an able staff working on this bill. It is a shame they cannot vote for it or against it, because they are about the only ones who know what is in it. It is also too bad that staff will not be held responsible by the pensioners if this bill does not work. But we know who will be held responsible.

We acted in a similar hurry-up manner when ERISA was passed in 1974. I was in the other body at the time, but I recall well the rush Congress was in to pass a law to protect pensioners from loss of their pensions.

Well, today we are scared to death at the possibility that the legislation might actually go into effect. It is so bad, so ill conceived as far as multiemployer plans go, that enactment of that legislation would bankrupt the system.

And yet, here we go again. Fumbling half blind through a bill.

How many Senators who are not on the Labor Committee or the Finance Committee have not had a chance to even see a clean copy of this bill yet, much less a committee report.

H6934, 6935 (daily ed. July 31, 1980) (statements of Rep. Frenzel and Rep. Rousselot) (App. at 8a-11a, 12a).

Even if one could divine the legislative twists and turns, there remains the imponderable element of presidential approval or disapproval. In this regard, the history of the Common Situs Picketing Bill, provides a striking example. Under that legislative proposal, building trades unions would have been entitled to picket an entire construction jobsite in protest of a dispute with a single contractor working at that site. The bill would have overruled legislatively this Court's longstanding decision in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). While then President Ford had promised initially to sign the bill, he later changed his mind and vetoed the measure to the surprise of those who had felt that its passage was secured. See *Congressional Quarterly Weekly*, Vol. XXXIV, No. 3 at 82 (Jan. 17, 1976).

The practical implications of accepting PBGC's and the Carpenters' Pension Fund's argument are limitless, and if accepted by this Court will detrimentably alter the manner of doing business in this country. In the making of commercial transactions and business decisions the ability to rely upon the existing state of the law is paramount and compelling. This need complements the ultimate reason why retroactive legislation violates our sense of justice by depriving those affected with adequate and meaningful notice of the legal consequences of their actions. Applying this rule to the Bankruptcy Reform Act of 1978, transactions affected by bankruptcy laws would have remained unsettled for almost a decade while Congress decided how it was going to reform the Bankruptcy Code.

To protect their interests, all "prudent" employers will have to retain legislative advisors at the federal, state, and local levels to counsel them on pending legislative and administrative measures and the way in which they *might* affect their immediate business decisions if enacted and applied retroactively. Taking as an example the legislative activity during the first and second sessions of the Ninety-Sixth Congress, which spans the period of time that the proposed MPPAA was being considered, it can readily be seen that any rule which requires anyone to foresee the outcome of pending legislation is intolerable. During this period over 14,000 measures were introduced. Almost 3,000 measures were passed, which included over 500 public bills. Over 63,000 pages of the Congressional Record were generated, which does not include the numerous

committee reports prepared. 126 Cong.Rec. D1593 (daily ed. Dec. 30, 1980) (Résumé of Congressional Activity of the Ninety-Sixth Congress).

Considering the vast volume of legislation introduced at every level of government, this Court will succeed only in creating a new business endeavor for lawyers to act as legislative watchdogs; and legions of them will descend upon the seats of government to practice the mystical art of legislative forecasting.

CONCLUSION

Based upon the foregoing, the court of appeals decision must be affirmed.

Respectfully submitted,

MERRILL AND SCHULTZ,
A Law Corporation

Michael E. Merrill
Stephen J. Schultz
Mark T. Bennett

Attorneys for amicus curiae
G & R Roofing Co.

APPENDIX

G & R ROOFING COMPANY, a California)
corporation,)

Plaintiff,)

v.)

CARPENTERS PENSION TRUST FOR)
SOUTHERN CALIFORNIA,)

Defendant.)

CASE NO. CV-81-5551-IH

STIPULATION OF FACTS
ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

4. Management of the assets of the trust and operation of the pension plan established by the CPT are entrusted to a board of trustees, half of whose members are appointed by the union and half of whose members are appointed by the multi-employer associations. At all

material times, the following individuals have been the union appointed trustees of CPT:

Paul Miller
John Ebert
Sam Heil
James W. Wood
Gerald T. Stedman

Each of the foregoing union-appointed trustees is an executive and/or an employee, and a member of either the Southern California Conference of Carpenters, one of the carpenters' district councils, or one of the carpenters' local unions, all of which are signatory to the 1977-1980 and 1980-1983 Carpenters' Master Labor Agreement.

At all material times, the following individuals have been the employer appointed trustees of CPT:

John W. Bernard
C.W. Driver
C.V. Holder
John H. Kuhl, III
Roy Silver

Each of the employer-appointed trustees is an executive officer and/or owner of a construction company which has been and is signatory to the 1977-1980 and 1980-1983 Carpenters' Master Labor Agreements by virtue of those companies' membership in one of the multi-employer associations which is signatory to the said master labor agreements.

5. Commencing in October, 1972, G & R was bound to a collective bargaining agreement with the union by virtue of having signed a memorandum agreement which incorporated the terms and provisions of the Carpenters' Master Labor Agreement negotiated from time to time. The terms of the collective bargaining agreement required, among other things, that G & R make contributions to CPT for each hour of covered work performed by carpenter personnel.

6. Substantially all of the employees with respect to which G & R had an obligation to contribute to CPT were performing work in the building and construction industry.

7. The most recent Carpenters' Master Labor Agreement to which G & R was bound (through its memorandum or "short form" agreement) required that notice to terminate or change said agreement must be given at least 60 days prior to June 15, 1980, or by no later than April 15, 1980.

8. On or about April 8, 1980, G & R sent the union a notice to terminate or change its collective bargaining agreement. G & R's agreement expired effective July 1, 1980.

9. G & R and the union negotiated on July 17 and 18, 1980, for the purpose of reaching a new collective bargaining agreement to succeed the collective bargaining agreement which terminated on July 1, 1980. On July 18, 1980, an impasse in negotiations was reached as the parties were unable to agree to a new collective bargaining agreement. As of July 18, 1980, G & R ceased having an obligation to contribute to CPT. The last pension contribution made by G & R to CPT was for work performed through August 12, 1980. G & R continued to employ persons after July 1, 1980 who performed, at least in part, work of the type covered by the expired memorandum or "short form" agreement, in the same geographic area previously covered by said agreement.

10. At all material times, CPT has claimed that it was under an obligation, pursuant to the provisions of Section 4202 of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. Section 1382, to determine the amount of G & R's alleged withdrawal liability, to notify G & R of the amount of its alleged withdrawal liability, and to effect collection of the total withdrawal liability amount alleged to be due from G & R.

11. CPT has made a calculation of G & R's alleged withdrawal liability, and has determined that it is a sum not less than \$687,387. G & R maintains that it has no legally enforceable obligation to pay withdrawal liability; and that in any event, G & R disputes the amount of alleged withdrawal liability calculated by CPT.

12. On or about September 2, 1981, CPT notified G & R of the amount of its alleged withdrawal liability and demanded payment thereof in accordance with a prescribed schedule. Said notification informed G & R of the total amount of its alleged withdrawal liability, and further notified G & R that it could elect to pay the total sum within 60 days in a single payment, or in the alternative, it must make monthly

installment payments for a period of 45 months. (A copy of the said September 2, 1981 notification from CPT to G & R is attached to the affidavit of Roderick R. Lopez offered in opposition to the motion for preliminary injunction, as Exhibit D).

13. The September 2, 1981 notification stated that monthly payments would be in the amount of \$17,397.83 for 45 months, and a final payment of \$1,922.53. Installment payments would total \$784,824.88.

14. Following notification, G & R did not within 60 days thereafter make any installment payment or make the alternative lump sum payment of its total alleged withdrawal liability.

15. By service of the answer and counterclaim on November 12, 1981, CPT notified G & R that it was delinquent in making its monthly installment payment or the alternative lump sum payment, and notified G & R that if it failed to cure the delinquency within 60 days, G & R would be in default with regard to payment of its alleged withdrawal liability obligation, and that CPT was entitled to declare the entire amount of G & R's alleged withdrawal liability due and payable, as of the due date of the first payment not timely made.

16. CPT claims, subject to the preliminary injunction order, that there is due and owing and unpaid by G & R to CPT the total sum of \$687,387, plus interest, liquidated damages of 20%, attorneys' fees and costs pursuant to Section 502(g)(2) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1132(b)(2).

17. On December 10, 1981, CPT took the deposition of Greg VanDenberg, the secretary/treasurer and sole stockholder of G & R. At that deposition, Mr. VanDenberg produced, pursuant to the CPT's request, the financial statements of G & R for the fiscal year ending September 30, 1980 and for the fiscal year ending September 30, 1981. Those financial statements were made exhibits to the deposition, CPT's Exhibits 101 and 102.

18. The financial statement of G & R for the fiscal year ending September 30, 1980, shows a stockholder's equity in the total amount of \$1,681,526, of which \$169,129 is sums advanced from officers.

19. The financial statement for the fiscal year ending September 30, 1981, shows a stockholder's equity of \$1,896,443 of which \$163,802 is sums advanced from officers.

20. The September 30, 1981 financial statement shows a net profit for the fiscal year of \$220,244.

21. The withdrawal liability claim of CPT against G & R is not based upon any contention that G & R has breached any prior collective bargaining agreement between G & R and the union.

22. CPT does not contend that the withdrawal liability claim of CPT against G & R has been generated or caused by the retirement of any particular current or former employee of G & R.

23. CPT does not contend that the withdrawal liability claim of CPT against G & R is based on the necessity for G & R to make any pension benefit contributions on behalf of any particular current or former employee of G & R. CPT does contend that its withdrawal liability claim against G & R is based upon provisions of the MPPAA.

24. No shareholder, officer, director, agent or representative of G & R has, during the period from 1972 to the present date, had any participation affecting:

- (a) the investment decisions pertaining to any assets of CPT,
- (b) the decisions of CPT to raise pension benefit levels,
- (c) decisions affecting CPT's administrative costs, or
- (d) the selection of actuarial assumptions or methods or accounting principles or methods upon which G & R's asserted withdrawal liability has been calculated.

CPT's decisions are made by its trustees in their sole discretion. The employer-appointed trustees are selected by members of the multi-employer associations which are signatory to the Carpenters' Master

Labor Agreement. At no time did G & R choose to apply for membership in or belong to any multi-employer association.

25. The collective bargaining agreements to which G & R was bound during the period from 1972 through July 1, 1980, did not guarantee or specify any certain pension benefit levels or payments for any qualified pension beneficiaries.

26. By entering into this stipulation, neither plaintiff or defendant waives the right to argue the relevancy of any of the foregoing stipulated facts.

MERRILL, SCHULTZ & HERSH
Attorneys for Plaintiff

DATED: February 16, 1982

By Michael E. Merrill
Michael E. Merrill

COX, CASTLE & NICHOLSON
Attorneys for Defendant

DATED: February 16, 1982

By James P. Watson, by [Signature]
James P. Watson

126 Cong. Rec. S10101 (daily ed. July 29, 1980)

Mr. Javits:

* * *

The effective date for the imposition of withdrawal liability is April 29, 1980. The committees decided in part to move up the date from February 27, 1979, the date contained in earlier versions of the bill, because the original purpose of a retroactive effective date--namely, to avoid encouragement of employer withdrawals while the bill was being considered--has been achieved. It should also be noted that the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date. I realize that permitting these employers to avoid liability only increases the burdens of those employers remaining with the plans in question, but it appears necessary to accept the April 29 date in order to enact the bill before the August 1 deadline for action. That somewhat increases the burdens of those employers who remain; but it appears necessary to accept this April 29, 1980, date in order to enact the bill before the August 1 deadline for action, which we now face; and it applies, of course, only within the particular multiemployer plans to which it relates.

* * *

126 Cong. Rec. S10103 (daily ed. July 29, 1980)

Mr. Dole:

* * *

For this reason, S. 1076 would impose a liability where an employee ceases to make contributions to a plan. The amount of this liability is his share of the amount which is necessary to fund retirement benefits but which has not yet been contributed.

In a single employer plan, it is relatively easy to determine what an employer must contribute in order to fund the benefits he has promised to pay. This determination is not so easy to make for a multiemployer plan.

The problem with determining withdrawal liability under this bill is that each employer's share of the plan's unfunded liability includes the amount that is directly attributable to his employees, but also includes a share of the liabilities that cannot be attributed to any one employer. An example of this is the liability left when another employer becomes insolvent and ceases contributions.

Furthermore, under the collective bargaining process, employers commonly negotiate only the rate of their contributions not the amount of the retirement benefit that the plan's trustees promise employees will result from the employer's contribution. If the plan's actuary is overly optimistic, further unfunded liability results.

This Senator recognizes that in many multiemployer plans it is impossible to trace the unfunded liability attributable to each employer.

* * *

126 Cong. Rec. S10157 (daily ed. July 29, 1980)

Mr. Matsunaga:

* * *

As I stated earlier, this date was also recommended by the Senate Labor and Human Resources Committee, and the House Education and Labor Committee. The Finance Committee considered the legislation in April of this year. Owing to the efforts of powerful lobbyists, the Committee on Finance moved up the effective date to April 29, 1980.

* * *

126 Cong. Rec. S10167 (daily ed. July 29, 1980)

Mr. Armstrong:

* * *

Mr. President, this is an extremely complicated piece of legislation. Every word of this bill is subject to interpretation by the IRS, the courts, the Department of Labor, and by hoards of lawyers in the private sector.

On this bill rests the financial future not only of many of America's largest corporations and pension plans, but also of thousands upon thousands of American workers.

And there is no committee report.

I think it is irresponsible to those persons whose futures depend on this legislation for us to act without such a report.

We almost passed this bill 30 days ago. Were it not for the quick action by some of my colleagues on this side of the aisle who put a hold on this bill, it might well have been passed 30 days ago as reported by the Labor Committee.

Over the objections of the managers of the bill, a 30-day extension was sought and finally agreed to.

I suppose it is a good thing that extension took place, since the managers of the bill have done much patchup work on it since then. Senators may not realize that this bill has been amended, altered, changed, and otherwise fiddled with no less than 335 times since it was reported out of the Labor Committee; 335 changes have been made in the bill that we almost passed 30 days ago.

This is the bill that was not even available to be put in front of Senators around the markup table in the Labor Committee. The record shows that Senator Schweiker railed up and down about how silly it was to try to mark up a bill with less than one-half of it in front of him.

Yet the markup pressed on, with Senator Schweiker being admonished about how hard staff had worked on the bill and about how every word had been gone over time after time and that it was nearly perfect.

Nearly perfect except for the 335 changes that staff made in it in the past 30 days, that is. And I am told they have a raft of additional amendments today.

Where do these amendments come from? Well, certainly, several of them are quite technical in nature, only changing a word here or there, or, changing an "and" to an "or" and such. In fact over 300 such little improvements were suggested by no less than the Pension Benefit

Guaranty Corporation, the Internal Revenue Service, and the Treasury Department.

Mr. President, I wish only to make a simple point. The U.S. Senate can ill afford to legislate in this sloppy manner. No bill for markup. No committee report. No 3-day rule for Senators to consider this legislation.

We are constantly told, "Let staff handle this," or "Staff will study this and work out the details." Well, I am very happy that we have such an able staff working on this bill. It is a shame they cannot vote for it or against it, because they are about the only ones who know what is in it. It is also too bad that staff will not be held responsible by the pensioners if this bill does not work. But we know who will be held responsible.

We acted in a similar hurry-up manner when ERISA was passed in 1974. I was in the other body at the time, but I recall well the rush Congress was in to pass a law to protect pensioners from loss of their pensions.

Well, today we are scared to death at the possibility that the legislation might actually go into effect. It is so bad, so ill conceived as far as multi-employer plans go, that enactment of that legislation would bankrupt the system.

And yet, here we go again. Fumbling half blind through a bill.

How many Senators who are not on the Labor Committee or the Finance Committee have not had a chance to even see a clean copy of this bill yet, much less a committee report.

They will be expected to vote on this bill today, too.

Mr. President, I considered offering another 30-day extension in lieu of passing this bill today, but I decided not to do that. While the bill might be improved during this extra time, it also might get loaded down with even more additions and amendments than are in it already.

We need this bill badly. Mostly because we fouled up in 1974, but we still need it badly. But we have had plenty of time to get a clean copy of the bill and we have plenty of time to get a committee report published.

It is a bad way to do business. If business did business in this way there would not be anybody in business.

* * *

126 Cong. Rec. S10520 (daily ed. August 1, 1980)

Mr. Durenberger:

* * *

Mr. President, I would have preferred a sunset provision to a study on the effects of this bill. There are few, if any, Members in the House or Senate who can confidently state how the bill will operate.

* * *

126 Cong. Rec. S10561 (daily ed. August 1, 1980)

Mr. Jepsen:

* * *

Mr. President, on Tuesday evening, I voted against S. 1076, the Multiemployer Pension Plan Amendments Act of 1980. I did so for a number of reasons.

First, I felt that it was unreasonable for the Senate to have to vote on such complicated and far-reaching legislation without the benefit of a committee report or sufficient time for those of us who are not members of the committees with jurisdiction to study the issues. I think that experience clearly shows that when Congress rushes through major legislation, bad laws inevitably results. A good example is carryover basis, which was tacked on to the Tax Reform Act of 1976 in the wee hours of the 94th Congress. The result is that the 96th Congress had to repeal this section of the bill.

* * *

126 Cong. Rec. H7903 (daily ed. August 26, 1980)

Mr. Erlenborn:

* * *

. . . gratuitous past service benefits for active participants which are related to years of service with an employer before the employer joined the plan should be excluded from the benefit guarantee. These benefits can create large unfunded liabilities and actually precipitate a plan's decline into insolvency.

* * *

126 Cong. Rec. H6934 (daily ed. July 31, 1980)

Mr. Frenzel:

* * *

I serve on one of the committees which has jurisdiction over these matters, but I have not had time to compare completely the remaining differences between the House and Senate. Any legislative body which tries to act blindly and with intemperate haste in this field will be likely to inflict grievous economic wounds on our society. I could not in good conscience agree to let this bill go forward in this manner.

* * *

126 Cong. Rec. H6935 (daily ed. July 31, 1980)

Mr. Rousselot:

* * *

Mr. Speaker, do I understand then that if there is an objection to this unanimous-consent request to proceed, as my colleague from Minnesota has indicated, with many aspects of this bill which even the people in this House are not totally familiar with, if there was such an objection we could go to a unanimous-consent request to take up the bill of the gentleman from Ohio, a member of the committee, to extend for 60 days the deadline; is that correct?

* * *

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MOTION FILED
JAN 10 1984

Nos. 83-245, 83-291

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.
R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.
R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF,
AMICUS CURIAE
and
BRIEF, *AMICUS CURIAE*, OF THE
NATIONAL-AMERICAN WHOLESALE GROCERS'
ASSOCIATION IN SUPPORT OF APPELLEE
R. A. GRAY & COMPANY

WILLIAM H. BORGHESE, JR.*
(*Counsel of Record)
MICHAEL F. MORRONE
PETER A. SUSSER
KELLER & HECKMAN
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-1100

Attorneys for *Amicus Curiae*,
National-American Wholesale
Grocers' Association

January 10, 1984

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.
R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,
Appellant,

v.
R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF,
AMICUS CURIAE

The National-American Wholesale Grocers' Association (hereinafter "NAWGA") respectfully moves, pursuant to Rules 36.3 and 42 of this Court's Rules, for leave to file the attached brief *amicus curiae*.¹ In support of this motion, NAWGA—by its undersigned counsel—states:

1. NAWGA is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. These companies, both large and small, supply grocer products and provide a wide array of services to retail grocery

¹ Pursuant to Rule 36.1, counsel for NAWGA requested the consent of counsel for the parties to the filing of a brief *amicus curiae* in this case. Counsel for appellant, Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to the filing of the brief, necessitating this motion.

stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly \$50 billion of the nation's grocery product volume and one-third of the grocery supply distributed nationally. NAWGA's food service division, the International Food Service Distributors' Association, represents member firms who sell annually over \$10 billion in food and related products to the institutional, away-from-home food service market.

2. Many NAWGA members are subject to collective bargaining agreements pursuant to which they contribute to various multiemployer pension funds. Since the enactment of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), P.L. No. 96-364, 94 Stat. 1208 (September 26, 1980), withdrawal liability has become a very important consideration to NAWGA and its members. NAWGA members have frequently indicated that multiemployer pension plan withdrawal liability is a serious problem which imposes restrictive and unfair burdens on wholesale grocers' attempts to conduct their businesses with optimal efficiency. A number of NAWGA members have been assessed with large amounts of withdrawal penalties; significantly, these have included members withdrawing from multiemployer plans between April 29, 1980 and September 26, 1980. The constitutionality of liability imposed for multiemployer plan withdrawal which occurred during this five-month period is the question presented in this case.

3. The decision below correctly articulated the fundamental due process standards violated by MPPAA's retroactive application to employers who withdrew from multiemployer plans prior to the statute's enactment. However, due to the fact that two appellate courts have now sanctioned the unconstitutional taking and interference with settled contractual expectations effectuated by the MPPAA's retroactive provisions, this Court's resolution of the Appellee's due process claims will have a nation-wide impact upon employers assessed with massive withdrawal liability for acts taken before the statute's enactment. Leave of this Court is sought to offer

NAWGA's unique, "hands on" perspective on the proper resolution of these important issues raised by the parties, so that the decision in this case can most effectively be reconciled with the due process rights of affected employers guaranteed by the Constitution.

For the foregoing reasons, NAWGA should be permitted to file the attached brief, *amicus curiae*.

Respectfully submitted,

/s/ _____
William H. Borghesani, Jr.

WILLIAM H. BORGHESANI, JR.*

(*Counsel of Record)

MICHAEL F. MORRONE

PETER A. SUSSER

KELLER & HECKMAN

1150 17th Street, N.W.

Suite 1000

Washington, D.C. 20036

(202) 457-1100

Attorneys for *Amicus Curiae*,

National-American Wholesale

Grocers' Association

January 10, 1984

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IN THE
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On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF of *AMICUS CURIAE*,
THE NATIONAL-AMERICAN WHOLESALE GROCERS'
ASSOCIATION IN SUPPORT OF APPELLEE
R. A. GRAY & COMPANY

INTRODUCTION

This case is a review of a decision by the United States Court of Appeals for the Ninth Circuit which held unconstitutional the retroactive application of the Multiemployer Pension Plan Amendments Act ("MPPAA" or "the Act"), P.L. No. 96-364, 94 Stat. 1208 (1980). The Act amended the multiemployer pension plan termination provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001a, *et seq.* (1976 and Supp. V 1981). The Court of Appeals held that the withdrawal liability provisions of the Act, as applied to employers who withdrew from multiemployer pension plans before the Act became law, violate guaranteed rights of due process.

The opinion of the Court of Appeals is reported at 705 F.2d 1502.

The question presented in this case is whether the Act's imposition of withdrawal liability is constitutional as applied to employers leaving a multiemployer pension plan prior to the date on which the Act became law.

1.

**INTEREST OF *AMICUS CURIAE*,
THE NATIONAL-AMERICAN WHOLESALE
GROCERS' ASSOCIATION**

The National-American Wholesale Grocers' Association ("NAWGA") is a national trade association which represents nearly 400 independent wholesale grocers and food service distributors. NAWGA's membership includes both large and small enterprises, and provides both grocer products as well as a wide array of services to various food service establishments throughout the country. Hospitals, schools, restaurants and retail grocery stores are among the many establishments supplied by NAWGA-member firms, whose \$50 billion in sales constitutes one-third of the grocery supply distributed nationally. In addition, the International Food Service Distributors' Association, NAWGA's food service division, is composed of member firms whose sales of food and related products to the institutional food service market exceeds \$10 billion annually.

The employees of a large number of NAWGA-member firms are organized by various labor organizations; indeed, many NAWGA members have contractual relationships with several different unions, which represent distinct bargaining units of their workers. Thus, locals of the International Brotherhood of Teamsters may represent the truck drivers employed by the wholesale grocer, while the United Food and Commercial Workers, the Hotel Employees and Restaurant Employees International Union or other labor organizations may represent distribution center employees or workers employed in other company facilities. Pursuant to many of the collective bargaining agreements involving such labor organizations, NAWGA-member firms contribute to various multiemployer pension funds.

Since the enactment of MPPAA, the issue of withdrawal liability assessment has been a major concern to NAWGA members and an important consideration in their business decisions. As a general matter, NAWGA-member firms have indicated that the potential assessment of massive, unbudgeted withdrawal liability—which may bear little, if any, relation to a company's assets or to the employees for whom the Company previously made contributions—has unfairly restricted efforts to operate with optimal efficiency. More directly, certain NAWGA members have been assessed with large amounts of withdrawal liability. Significantly, a number of these assessments have been made against companies withdrawing between April 29, 1980 and September 26, 1980, the "retroactive period" at issue in this case. The considerable impact on NAWGA members of such assessments for pre-enactment actions, together with an overall interest in the withdrawal liability mechanism created by MPPAA, establishes the interest of NAWGA and its members in this proceeding. As is evident in the argument which follows, NAWGA is supportive of the position of Appellee R. A. Gray & Company, that the decision of the Court of Appeals should be affirmed.

2.

SUMMARY OF ARGUMENT

The application of the withdrawal liability provisions of the MPPAA to employers leaving multiemployer pension plans in the period between April 29, 1980 and the Act's enactment on September 26, 1980, is unconstitutional, in that it violates guarantees against unwarranted deprivations of property. The Act's imposition of liability for actions taken in reliance upon existing law during that "retroactive period" would override contractual limitations on pension contributions and retirement obligations contained in such employers' collective bargaining agreements. It would retroactively establish responsibility for plan "unfunded liability", even though the withdrawing employer: (1) never agreed to such obligations; (2) did not create such plan funding problems; (3) had no control over actions, initiated by plan trustees with fiduciary obligations to participants and beneficiaries, which may have enhanced funding

obligations and shortfalls; and (4) had no notice of any provision of law which could create such liability.

These harsh and unfair effects of the MPPAA's retroactive application are violative of guarantees articulated in the Contract Clause, U.S. Constitution, Art. I, §10, cl. 1, and the Taking Clause, U.S. Constitution, Amendment V. Moreover, the decisions of this Court establish that the retroactive creation of such liability cannot be constitutionally tolerated. In *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935), a pension scheme similar to the MPPAA which imposed upon one employer certain pension liabilities attributable to employees of another employer was invalidated. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), another pension scheme which—like the MPPAA—subjected employers to non-contractual liability with no provision for a “grace period” was also found to be unconstitutional. This Court's holdings in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920) and in later cases prohibit action to deny an employer's right to withdraw assets from an existing business and to terminate that enterprise. Such right is effectively eliminated by the Act's retroactive imposition of withdrawal liability which can exceed a business' total assets. Finally, this Court's limited approval of retroactive liability in the form of benefits for occupationally-induced lung disease in *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976), does not immunize the scheme evident in the Act. The withdrawal liability at issue in the instant case was retroactively imposed to meet a former employee's “generalized need for funds” rather than to meet a “specific need created by the dangerous conditions under which the former employee labored.” Therefore, the Court of Appeals decision finding that the retroactive application of withdrawal liability is unconstitutional should be affirmed.

3.
ARGUMENT

WITHDRAWAL LIABILITY IMPOSED ON PRE-
ENACTMENT TRANSACTIONS DISRUPTS SETTLED
CONTRACTUAL EXPECTATIONS AND OTHERWISE
VIOLATES THE FIFTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

A. MPPAA's Withdrawal Liability Provisions Unlawfully
Interfere with the Settled Contractual Expectations of
Employers Withdrawing During the "Retroactive Period"

The Constitution of the United States of America prohibits retroactive interference by government with private rights of contract unless such interferences are "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 22 (1977). Although this specific prohibition is contained in the Contract Clause, U.S. Constitution, Art. I, §10, cl. 1, applicable to the states, the principles involved are analogous to those which similarly apply to the federal government under the Due Process Clause, U.S. Constitution, Amendment V. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 n. 12 (1978).¹

The Contract Clause prohibits any "Laws impairing the Obligation of Contracts" and was included by the Founders as a "constitutional bulwark in favor of personal security and private rights."² They viewed the Contract Clause as the civil

¹Contrary to the argument advanced in the Brief of Appellant, Pension Benefit Guaranty Corporation ("PBGC"), this Court has recognized that due process jurisprudence has largely encompassed contract clause principles, see *Allied Structural Steel Co. v. Spannaus*, *supra*, and that the Fifth Amendment Due Process Clause thus protects against the same unreasonable infringement of contract rights on the part of the federal government. Indeed, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (incorporating principles of the equal protection clause of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment).

²*The Federalist*, No. 44 (Madison).

equivalent of the prohibition against *ex post facto* criminal laws, and intended "that *retroactive* interferences [with contracts] only are to be prohibited."³ They consequently recognized that it is "cruel and unjust" to impose liability on actions taken based on pre-existing law: "[a]ll laws should be therefore made to commence *in futuro*, and be notified before their commencement."⁴

The Act is in direct conflict with these principles and with the rulings of this Court, as its confiscation of the assets of an employer withdrawing during the retroactive period overrides the provisions in freely-negotiated collective bargaining agreements which delineate financial liability for pension obligations and establish a negotiated dollar amount for such contributions. The Act's application of liability to employers who withdrew from multiemployer plans during the retroactive period because of the termination of their obligation to make contributions (for one of several reasons), clearly demonstrates the disruption of expectations protected by the Constitution.⁵

Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), involved this Court's consideration of the Railroad

³ 2 M. Farrand, *Records of the Federal Convention of 1787*, 440, 448-49 (rev. ed. 1966) (statement of Mr. Wilson) (emphasis in original).

⁴ *Blackstone's Commentaries*, Introduction, §II at 45 to (Cooley ed. 1884). While the above-quoted statement relates to Blackstone's analysis of "ex post facto" laws, which were viewed as dealing with criminal cases, such views were relied upon by the Founders with respect to the prohibition of such statutes, as well as their civil equivalent found in the Contract Clause.

⁵ This Court's holdings have established a "narrower scope" for review "when legislation appears on its face to be within a specific protection of the Constitution." *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938). "[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Once such a violation of a specific prohibition is shown, the appellants have the affirmative burden to justify the statute without the benefit of any presumption of constitutionality. *Id.*, at 639. See also, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978).

Retirement Act, which created a compulsory retirement and pension system funded by mandatory contributions from employers. Those eligible for benefits included persons over 65 years of age, whether or not they were then employed by the contributing railroads. The Court noted:

Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier.

Id. at 349-50. The Court further concluded that the application of the statute had no reasonable relation to the pronounced goals of efficiency and safety. For these reasons, the Court held that the statute violated the Fifth Amendment.⁶

⁶The Court's decision in *Alton* was issued in a period when economic regulatory statutes received strict scrutiny under the Due Process Clause. The Court distinguished but declined to overrule *Alton* in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the case principally relied upon by the Appellants and which is discussed below in further detail. Of significance is the manner in which the remedial compensation scheme considered in *Turner Elkhorn* was distinguished from the pension statute reviewed in *Alton*. The point of the black lung benefits program in *Turner Elkhorn* was to allocate to coal operators an actual, measurable cost of doing business, not merely to "increase or supplement a former employee's salary to meet his generalized need for funds". 428 U.S. at 19. In contrast, employers withdrawing during the MPPAA's retroactive period have already met their compensation commitments to employees, including wages, benefits and agreed-upon pension contributions on the individual employee's behalf to a pension fund. In the absence of the "special need" or measurable cost present in *Turner Elkhorn*, the Act is, therefore, specifically designed to "supplement a former employee's salary" by requiring the employer withdrawing during the retroactive period to pay for a level of pension benefits established and promised by the fund, but not by the employer through the collective bargaining agreement or any other mechanism.

Similarly, in *Allied Structural Steel Co. v. Spannaus*, *supra*, this Court struck down a Minnesota statute which had required a company terminating its pension plan or terminating an office within the state to pay a pension funding charge to cover full benefits for those with ten years of service, whether or not their benefit rights had vested. The statute also had imposed minimum funding standards and had held employers responsible for eliminating funding deficiencies. The Court concluded that the statute had substantially impaired the employer's contractual rights by fixing on it obligations radically different from those which had previously existed. The contract rights so impaired were limitations on the employer's pension liability, and the company had reasonably relied on those limitations. The Court specifically noted:

The company's maximum obligation was to set aside each year an amount based on the plan's requirements for vesting. The plan satisfied the current federal income tax code and was subject to no other legislative requirements. And, of course, the company was free to amend or terminate the pension plan at any time. The company thus had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.

438 U.S. at 245-46. The Court expressly recognized that the employer's reliance on settled contractual expectations was "in an area where the element of reliance was vital—the funding of a pension plan." *Id.* at 246. The Court further stated:

Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods.

Id. at 247. Thus, the Court's decision in *Spannaus* suggested that "employers [are] constitutionally entitled to some grace period to adjust their pension planning." *Id.* at 249 n.23. Like the pension law struck down in *Spannaus*, the MPPAA contains no provision for grace periods, but rather makes the liability retroactive for employers who withdrew from plans even before the Act became law. The Act thus violates what the Court's decision in *Spannaus* suggested to be a constitutional entitlement.

The significant contractual expectations of employers withdrawing during the retroactive period which the MPPAA would override far outweigh any "contrary" reliance by covered employees. The employer's contractual limitation of liability to the negotiated contribution level embodied in the collective bargaining agreement is crucial to the employer's bargain with the union. The known and limited commitment allowed employers to plan for the future and to assess the costs involved in signing a collective bargaining agreement with the union, an especially important consideration in view of the employer's lack of control over the plan's operations and decisions.⁷ On the other

⁷Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. §186(c)(5) (1976), requires that the trustees of a multiemployer pension plan be equally divided between management and labor. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). In the operation of a multiemployer plan, the union may lawfully refuse to grant the individual company a representative on the board of trustees or any role in the selection of the management trustees. Thus, in *Central Florida Sheet Metal Contractors Ass'n v. NLRB*, 664 F.2d 489 (5th Cir. 1981), the court, relying on *Amax Coal Co.*, *supra*, held that the union acted lawfully by striking to force an employer association to contribute to a trust fund, even though the association had had no voice in selecting a trustee, who had been appointed by the first participating employers' association. 664 F.2d at 495, 499.

In addition, by law, the management trustees may not represent the collective bargaining interests of the employers participating in the plan, but must instead devote themselves exclusively to representing the interests of the employees who are entitled to receive pensions. See *Amax Coal Co.*, *supra*, 453 U.S. at 331-32. Moreover, the pension plan may lawfully grant a benefit even if the individual employer has refused that benefit in collective bargaining, and even though he has refused to increase his contributions to fund the benefits. *NLRB v. Teamsters Local 582*, 670 F.2d 855 (9th Cir. 1982), relying upon *Amax Coal Co.*, *supra*.

hand, employees look to the plan for the fulfillment of their pension expectations and to the union for assuring through the collective bargaining process that contributions are sufficient to fund the benefits set by the plan. The employees cannot be said to have relied upon a contractual provision—complete employer underwriting of the plan—that did not exist.

In summary, therefore, the retroactive application of the MPPAA would unconstitutionally disturb the contractual reliance of employers withdrawing before the Act's effective date. The Act impairs the expectations created by collective bargaining agreements which established the obligation of withdrawing employers to initially participate in various pension funds. Employers withdrawing during the "retroactive period" had negotiated and relied upon fixed contribution levels to limit that liability. The MPPAA retroactively shatters such employers' expectations in an irrational and arbitrary fashion by imposing liability which may exceed the total worth of an employer's assets, and which may not be solely related to the employees for whom contributions had previously been made.⁸

⁸ The MPPAA penalty of withdrawal liability is imposed without regard to whether the liability is attributable to the service of the employer's workers. Under several of the Act's methods of allocating unfunded liability to withdrawing employers (specifically, the "presumptive" formula and the two statutory alternative methods), the calculated share of an employer's liability is based upon the ratio of his contributions to the total contributions of the plan. See 29 U.S.C. § 1391(b), (c) (1)-(3) (Supp. V 1981). The ratio of employer's contributions, however, bears no relationship to a plan's unfunded liability, as its contribution rate is a product of negotiations with a union. The plan's unfunded liability would be principally derived from ERISA's statutory and nonforfeiture rules, benefit increases established by plan trustees, and unfunded liability arising from withdrawals in the pre-Act period.

B. MPPAA's Withdrawal Liability Provisions Constitute An Unlawful Taking of Property from Employers Withdrawing During the Retroactive Period

The Due Process Clause of the Fifth Amendment prohibits the federal government from taking individuals' private property interests without just compensation for the satisfaction of public needs. Mere governmental regulation may be "so onerous as to constitute a taking which constitutionally requires compensation." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). See also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("... a man's misfortunes or necessities will [not] justify his shifting the damages to his neighbor's shoulders"). Federal legislation which results in the confiscation of private property must meet certain conditions in order to survive a constitutional challenge under the Fifth Amendment. In addition, the Taking Clause prohibits efforts by government to force employers to stay in business against their will.⁹ Similarly implicated is the related policy of avoiding inhibitions on the free transfer of capital, necessary to preserve the flow of interstate commerce.¹⁰ The MPPAA, as applied to employers withdrawing from multiemployer plans during the retroactive period, fails to satisfy these conditions, which are similar in some ways to those relating to legislation impairing contractual rights.

First, confiscatory legislation must be "reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 127 (1978). Moreover, such legislation must not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong v. United States*, 364 U.S. 40, 49 (1960).¹¹ Finally, the

⁹ *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 399 (1920). See also *Railroad Commission v. Eastern Texas Railroad*, 264 U.S. 79, 85 (1924); *Bullock v. Florida ex rel. Railroad Commission*, 254 U.S. 513, 521 (1921).

¹⁰ See e.g., *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972).

¹¹ See also *United States v. Carolene Products*, 304 U.S. 144, 152, n.4 (1938); *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177, 184, n. 2 (1938).

means chosen to address a public need must not be "unduly oppressive". *Goldblatt v. Town of Hempstead*, *supra*, at 595. See also *Chatham v. Jackson*, 613 F.2d 73, 78 (5th Cir. 1980).

The application of the MPPAA's withdrawal liability provisions to employers withdrawing before the Act's enactment would not necessarily have any direct relation to such employers' assets or to benefits owed to their ex-employees, and would be, therefore, arbitrary and inequitable. Withdrawal liability would be a severe financial penalty imposed to cure funding deficiencies resulting from (1) increases in benefits unilaterally determined by the plan trustees, and (2) benefit funding and vesting rules established by Congress, but not due to any action by the employer. Therefore, it would amount to an oppressive confiscatory taking far beyond the means relatively necessary to achieve the stated purpose of the Act.

The MPPAA in its retroactive application is violative of the important constitutional limitations established in this Court's earlier holdings. As noted above, in *Armstrong v. United States*, *supra*, the Court decided that the federal government could not compel a select few to bear the brunt of a public burden. However, the MPPAA places the retroactive burden of its public purpose on employers participating in multiemployer pension plans as of April 29, 1980, who withdrew on or after that date. Employers who withdrew on or before April 28, 1980 have no such liability. Additionally, the MPPAA exempts from withdrawal liability for a period of six years employers who newly entered multiemployer pension plans after April 28, 1980, or who so enter such plans in the future. Thus, a select group has been chosen to bear the responsibility for resolving what Congress considers to be a public problem. In addition, the MPPAA burdens or abrogates altogether the employer's ability to go out of business or make other significant business decisions. By putting a price tag of confiscation of his assets on any such action, the MPPAA confines the employer to the way he was structured and operating in 1980.

C. The Court of Appeals' Assessment of MPPAA's Retroactive Effects Should Be Affirmed

In its decision, the Court of Appeals concluded that the retroactive application of the Act's withdrawal liability provisions violated constitutionally-guaranteed due process rights of employers who withdrew before the Act became law. The lower court recognized that the MPPAA came to the courts with a presumption of constitutionality, and that a statute with retroactive aspects is not unlawful for that reason alone, unless such effects are harsh and oppressive. *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1510 (9th Cir. 1983). In approaching the due process issues raised by the retroactive effects of the Act, the Court of Appeals measured the MPPAA against considerations utilized by the Seventh Circuit in an earlier review of ERISA's application to single-employer plans in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). In examining whether the statute's retrospective imposition of liability superseded a liability exclusion clause in the plan, the court in *Nachman* analyzed four factors: 1) reliance interests; 2) previous regulatory control of the private interest arguably impaired; 3) equitable interests, and 4) applicable moderating provisions.

Adopting a similar analysis in reviewing the retroactive imposition of the MPPAA's withdrawal liability provisions, the Ninth Circuit properly concluded that reliance interests clearly weighed in favor of the employers:

It was not certain at the time they withdrew that the Amendments Act would be enacted and would have a retroactive effect. We reject the argument that the employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980 . . . it would have been impossible for anyone

to predict with accuracy the final outcome of the legislative process.

705 F.2d at 1511 (citation omitted). In evaluating the reliance interest of participants and beneficiaries, the appellate court correctly found that such interests rest upon the solvency of the multiemployer plan as a whole, rather than upon any single employer's contribution. Such an expectation "does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability." *Id.*

Moreover, the Court of Appeals determined that the mere existence of prior regulation of pension plans—at least since the passage of ERISA in 1974—did not weigh in favor of the Act's retroactive application. It correctly recognized that the MPPAA was not a minor clarification or modest modification of pre-existing regulation, but rather that it imposed a much more harsh and heavy burden than had been imposed upon withdrawing employers under ERISA. Thus, prior to the Act's enactment, contributing employers could generally withdraw from an ongoing plan without being subject to any immediate liability. Such employers could be subject to liability—and then only to a maximum of thirty percent of their net worth—if the plan terminated within five years of their withdrawal. 29 U.S.C. §1363 (1976) (amended 1980).¹² The Ninth Circuit properly went on to hold that the absence of such effective moderating provisions from the Act distinguished it from the single-employer scheme upheld in *Nachman, supra*.

Finally, the Court of Appeals reviewed the burdens imposed by the MPPAA upon individual employers assessed with liability, in conjunction with the policies Congress hoped to further by establishing a retroactive date for the Act. It correctly noted the narrow scope of permissible retroactive legislation, and accurately concluded that the extremely harsh burdens

¹² "Substantial employers", i.e., those employers responsible for ten percent of a plan's total contributions, could similarly withdraw without facing immediate assessments of liability prior to the enactment of the MPPAA. Such employers were required to post a bond against their potential substantial liability. 29 U.S.C. §1363 (1976) (amended 1980).

imposed by the MPPAA were not justified in the absence of "special needs" or "hidden risks" which served to justify other forms of retroactive legislation. *Shelter Framing Corp. v. Pension Ben. Guar. Corp.*, *supra*, 705 F.2d at 1513-14.

In reaching its contrary conclusion on the same question, the Fourth Circuit, in *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir. 1983), concluded that the Act was rational, basing its conclusions principally upon the reliance interests of employees in receiving vested benefits. By contrast, that court minimized the reliance interest of employers irrevocably withdrawing from multiemployer plans at a time when such action generated no immediate liability, and stated that Congressional debate and actions prior to enactment gave all employers fair notice of "the substantial impact of withdrawal liability". 718 F.2d at 639. It found that because single-employer plan termination had been regulated since the enactment of ERISA, the postponement of multiemployer withdrawal liability merely evidenced Congressional caution, raising no reliance interest on the part of employers contributing to such plans. While recognizing that employee pension expectations may have been based on "promises" which may have been "implied" rather than actual, *Id.*, the Fourth Circuit failed to consider unique distinctions in the operation of the multiemployer plans at issue, *i.e.*, that employers merely agree to make specified contributions, and that benefits are established or "promised" by trustees who exclusively represent the interests of participants and beneficiaries, *supra* note 7.

In *Peick v. Pension Benefit Guaranty Corporation*, _____ F.2d _____, No. 82-2081 (7th Cir., Dec. 19, 1983), the Seventh Circuit recently affirmed the "extremely close call"¹³ of U.S. District Court Judge Susan Getzandanner that the retroactive aspects of the Act's application of withdrawal liability to pre-enactment actions was constitutional. That court concluded that a balance of equitable interests did not weigh against the

¹³*Peick v. Pension Benefit Guaranty Corporation*, 539 F. Supp. 1025, 1056 (N.D.Ill. 1982), *aff'd* _____ F.2d _____, No. 82-2081 (7th Cir., Dec. 19, 1983).

constitutionality of the Act's retroactive provisions. *Peick*, slip op. at 49. The Seventh Circuit's approval of withdrawal liability assessments for pre-enactment actions was premised upon its view that employers could not properly rely on existing law when engaging in pre-enactment transactions later producing liability assessments:

During the period between April 29 and September 26, 1980, it was clear to anyone concerned about multiemployer pension plans that employers would be subjected to withdrawal liability under the MPPAA. At most an employer could claim only uncertainty as to the details of this liability, not that this liability was a surprise.

Peick, slip op. at 45.

Consistent with such views, the appellants herein argue that Congress properly held employers responsible for knowledge that the MPPAA would be passed, and that it would have a pre-enactment effective date. One court has suggested that it was "hardly credible" for employers to deny knowledge of the proposed Act's retroactivity, *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404, 409 n. 8 (S.D.N.Y. 1982), argued No. 83-7004 (2d Cir., Oct. 3, 1983), and Appellant herein, PBGC, cites three general news reports (two of which were "buried" on the inside pages of *The New York Times* and *The Wall Street Journal*) in support of the proposition that the pending Act's provisions were widely known. Brief for Appellant, PBGC, at p. 35-6. NAWGA respectfully submits that such "notice" cannot be fairly ascribed to the many small and medium-sized businesses across the country (who—needless to say—cannot and do not finance squadrons of Washington representatives to monitor pending legislation), who contributed to multiemployer plans on behalf of a relatively small number (and/or portion) of their employees. Such employers' assets may be more than entirely consumed by the statutory withdrawal penalty which did not exist at the time those employers took irreversible business actions. See Appellee's Motion to Affirm, p. 20, n. 6, and authorities cited therein. Appellant PBGC suggests that this harsh retroactive application

of withdrawal liability is justified in all instances by the fact that retroactive provisions had been part of the bill throughout Congressional deliberation, and by the fact that the scope of the retroactive period had been shortened.¹⁴

NAWGA submits that the appellants' theory would establish a standard holding large and small employers to knowledge of detailed and complicated provisions of every legislative proposal which, if eventually enacted, might effect business actions taken before enactment. That such a standard would be unduly burdensome, unfair and unworkable is illustrated in the case of the MPPAA, in that the penalty which the statute would impose in the case of retroactively-applied withdrawal liability can include the termination of an employer's business and the seizure of all of a covered business' assets.

The petitioning parties have urged reversal of the decision below, arguing that the Act's retroactive application of withdrawal liability to employers who justifiably relied on existing law in entering business and in consummating economic transactions prior to MPPAA's enactment is constitutional. The petitioning parties contend that the Act and its effects are both rational and necessary. Both appellants rely principally upon this Court's holding in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in support of their view that the Act's retroactive imposition of withdrawal liability passes constitutional muster. *Turner Elkhorn* involved the review of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. §901, *et seq.*

¹⁴ While much is made in the briefs of the petitioning parties of the fact that the five-month retroactive period was necessary to deter "hasty" withdrawals by employers anticipating MPPAA's enactment, it is worthy of note that such a "flood" of withdrawals would have likely required wholesale contractual and statutory violations. While those employers whose contracts expired in the retroactive period might have been able to effectuate withdrawal (as might employers going out of business or those able to negotiate contractual arrangements allowing withdrawal during a contract term), the vast majority of multiemployer plan contributors were bound by effective contracts during this "retroactive" period. Unilateral action to cease multiemployer plan contributions would likely have breached such employers' contractual promises to make specified contributions to a specified retirement plan, and violated Section

(1970 ed. and Supp. IV)¹⁵ which provides benefits to coal miners, former miners, their dependents and survivors for death or disability due to pneumoconiosis arising out of coal mine employment.

In *Turner Elkhorn*, coal mine operators who were liable for the payment of benefits to eligible miners under Part C of the black lung benefits program contended that the statute violated constitutional guarantees of due process, in that they were required to compensate certain of their former employees whose coal mining terminated before the statute's enactment. The operators argued that such obligations impermissibly imposed unexpected liabilities for past completed acts. Upholding the validity of the Black Lung Benefits Act, this Court stated that "... legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations", even if such statutes impose new duties or create liability based on past acts. 428 U.S. at 16.

At the same time, the Court noted that distinctions exist between due process standards applicable to prospective legislation, and those applicable to retroactive measures:

It does not follow . . . that what Congress can legislate prospectively it can legislate retroactively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Id., at 16-17. The Court's opinion placed into further question any scheme imposing retroactive liability based upon theories of "deterrence" or of "blameworthiness". *Id.*, at 17-18.

8(a) (1) and (5) of the National Labor Relations Act, 29 U.S.C. RR158(a) (1), (5), by unilaterally changing a term and condition of employment.

¹⁵ The black lung benefits provisions of the U.S. Code were subsequently amended by the Black Lung Benefits Reform Act of 1977, P.L. 95-239 (1978); the Black Lung Benefits Revenue Act of 1977, P.L. 95-227 (1978); and the Black Lung Benefits Amendments of 1981, P.L. 97-119 (1981).

Concluding that the Black Lung Benefits Act rationally resolved issues of cost spreading within the coal mining industry, the Court relied upon that statute's scope and purpose, which it distinguished from the pension scheme invalidated in *Railroad Retirement Board v. Alton R. Co.*, *supra*:

The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary or meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

428 U.S. at 19. In contrast, the retroactive liability at issue in the instant case bears no resemblance to the occupational disease payments approved in *Turner Elkhorn*, which were imposed upon employers whose profits were likely related to the diminished health giving rise to liability. Rather, it is designed solely to supplement a former employee's wage and benefit compensation beyond the level specifically set forth in the governing collective bargaining agreement, so as to meet the unfunded liabilities of the pension plan.

Retroactive imposition of withdrawal liability under the MPPAA is distinguishable further from the liability imposed in *Turner Elkhorn*. First, the imposition of liability in *Turner Elkhorn* was for the sole and direct benefit of the employer's own employees, from whose labor the employer had profited. Withdrawal liability under the MPPAA lacks a direct employer-employee link. While it is true that a withdrawing employer is assessed a share of the plan's unfunded vested liability, such liability does not necessarily accrue to the employees on whose behalf an employer had agreed to contribute to the plan in the first place.

Second, the allocation of costs to provide relief for those with black lung disease represented a Congressional attempt to address a specific problem which had arisen directly from employees' working conditions, *i.e.*, lung disease arising from coal

mine employment. Indeed, this Court noted in *Turner Elkhorn* that pneumoconiosis was not recognized in the United States as a distinct disease process until the 1950's; the massive number of benefit claims filed in the first years of the black lung benefits program demonstrated the scope of the problem faced by Congress, *i.e.*, providing disease compensation where state laws were inadequate, and where the illness had been insufficiently appreciated. *Turner Elkhorn, supra*, 428 U.S. at 8, n. 7, and 17, n. 17. The unique need which was present in *Turner Elkhorn* is absent in this case.

While pension expectations of workers represent a worthy societal and Congressional concern, the imposition of harsh and unlimited penalties capable of consuming an employer's total assets through a statute which operates retroactively upon closed and irrevocable actions is arbitrary, irrational and unfair. The Act's withdrawal liability provisions, as applied to pre-enactment transactions, violate fundamental notions of fairness and due process, are manifestly disruptive of property rights and contractual expectations, and should be held to be unconstitutional by this Court.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/ _____
William H. Borghesani, Jr.

WILLIAM H. BORGHESENI, JR.*
(*Counsel of Record)

MICHAEL F. MORRONE

PETER A. SUSSE

KELLER & HECKMAN

1150 17th Street, N.W.

Suite 1000

Washington, D.C. 20036

(202) 457-1100

Attorneys for *Amicus Curiae*,
National-American Wholesale
Grocers' Association

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No. 83-245

CHESTER L. STEVENS
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OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS AS AMICUS CURIAE
IN SUPPORT OF APPELLEE**

Of Counsel:

JAN S. AMUNDSON
General Counsel

GARY D. LIPKIN

QUENTIN RIEGEL

Assistant General Counsel
NATIONAL ASSOCIATION OF
MANUFACTURERS

1776 F Street, N.W.

Washington, D.C. 20006

(202) 626-3860

CHESTER W. NOSAL *

JOHN R. KEYS, JR.

WINSTON & STRAWN

2550 M Street, N.W.

Washington, D.C. 20037

(202) 828-8400

*Counsel for the National
Association of Manufacturers*

* *Counsel of Record*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-245

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS AS AMICUS CURIAE
IN SUPPORT OF APPELLEE**

This Brief is filed by consent of the parties on behalf of the National Association of Manufacturers (NAM) in support of the Appellee. Written consents are filed with the Office of the Clerk.

INTEREST OF THE AMICUS CURIAE

The NAM is incorporated under the laws of the State of New York as a not-for-profit, voluntary business association representing approximately 13,500 manufacturers and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. Many of NAM's members are required by their

collective bargaining agreements with various labor unions to make payments to multiemployer pension plans, and many of these plans have unfunded vested benefits (UVB).

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), P.L. 96-364; 29 U.S.C. §§ 1381 *et seq.* (Supp. V 1981), created and forced onto contributing employers a liability for the UVB of multiemployer plans which reaches into billions of dollars and which by some estimates may exceed \$50 billion.¹ This liability affects employers even when they have not withdrawn from a plan because it must be reflected in their financial statements. *Peick v. PBGC*, No. 82-2081, slip op. at 57 (7th Cir. Dec. 19, 1983) (dissenting opinion).

MPPAA is disrupting the day-to-day conduct of business. See 128 Cong. Rec. E5326 (daily ed. Dec. 18, 1982). Businesses cannot be sold; older businessmen cannot retire and cannot sell their companies. *Id.*; 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Plants with declining demand for their products cannot close. *Id.* Huge liabilities are being imposed as the result of events such as losing a competitive bid contract or bargaining to impasse with a labor union. 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Joining a multiemployer plan has become a strike issue, and the plans, their beneficiaries, and contributing employers all are suffering as a direct result of MPPAA.

Since NAM member companies are some of the principal obligors of MPPAA withdrawal liability, and since NAM and its members have a profound and lasting in-

¹ See Pension Benefit Guaranty Corporation, Multiemployer Study Required By P.L. 95-214, App. XIV, at 11, 14 (July 1, 1978) printed in *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess., 1149-1481 (1980) [hereinafter "PBGC Report"].

terest in the well-being of the multiemployer pension system in the United States, NAM is vitally interested in the Court's decision in this case.

SUPPLEMENTAL STATEMENT

The Oregon-Washington Carpenters-Employers Pension Trust Fund (the Fund), a multiemployer pension plan, found R.A. Gray & Co. to have withdrawn from the Fund on June 1, 1980. The Fund thereafter assessed Gray a liability of \$201,359 pursuant to the provisions of MPPAA which did not become law until September 26, 1980 but which Congress made retroactive to April 29, 1980. (J.A. 8-12.) Gray challenged the constitutionality of the Act. The district court dismissed Gray's complaint, but the court of appeals reversed, holding the statute unconstitutional as applied in the retroactive period and reserving ruling on other constitutional issues.

1. The Great Majority of Multiemployer Plans Are Stable and Financially Sound

Multiemployer plans have provided a desirable and effective means of providing for employee benefits because, not being dependent upon the good fortune of one company, they are inherently more stable than single-employer plans. H.R. Rep. No. 96-869, pt. I, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2921 [hereinafter cited as U.S. CODE CONG. NEWS]. An important reason for such stability of multiemployer plans is the "employer turnover assumption." In a stable or growing industry, the withdrawal of an employer from a plan usually will not harm the plan because new employment will fill the void created by withdrawal. *Id.* at 2922. Either new employers will enter, or existing employers will hire additional employees. *Id.* Any injury done to the plan's contribution base by the withdrawal will quickly be repaired.

The fact that a plan has some measure of unfunded vested benefits is not determinative of its financial health. With respect to any defined benefit pension plan there are many factors which are used to measure whether the plan is soundly funded.² One factor is the present value of the total amount of vested benefits for which the fund is liable. This is an amount which must be amortized and funded over long periods of time (normally 30 years) and is calculated according to a set of actuarial assumptions and rules adopted by the plan. If a plan's assets are less than the value of its vested benefits, the difference is the measure of the plan's UVB.

Most multiemployer plans have some amount of UVB. In part, this is because plans generally are not designed by the trustees to fund all benefits through employer contributions. A plan can invest the funds it accumulates through contributions and can use its investment earnings to fund benefits. See 29 U.S.C. § 186(c) (5) (A) (1976). At any point in time the plan's assets and its liabilities are functions both of its past experience and its predictions of future experience. These in turn are based upon the decisions of the trustees and to some extent by the operation of external economic forces. As long as the plan is amortizing its UVB on a timely basis, the plan will be in good financial condition. See, e.g., 26 U.S.C. § 412 (Supp. V 1981). Many plans have been accumulating UVBs going back to their inception, some as far back as the late 1940's.

² Some of the other quantitative factors that are used to evaluate the financial well-being of a plan include factors used by the PBGC in its 1977 and 1978 studies such as (1) the ratio of retired and inactive vested participants to total participants; (2) the ratio of assets to annual benefit obligations; (3) the ratio of cash flow to assets; (4) the ratio of normal cost to total contributions; and (5) the rate of increase (or decrease) in assets. PBGC Report at 15, App. XIV.

2. The Oregon-Washington Carpenters Fund Is Financially Sound

The Fund in this case is a good example of one that is stable and financially healthy. In 1980, it had assets of \$56.9 million, up 24 percent from the previous year, which represented 69 percent of its vested liabilities. (J.A. 74, 80.) The Fund's actuaries found this funding level to be "more than sufficient to pay off the pensioner's liability." *Id.* The percentage of funded vested liability was increasing each year. *Id.* The plan had a funding balance credit of \$8.7 million. (J.A. 74.) Moreover, the plan's contribution base was growing steadily. *Id.* Active membership had increased 16 percent and contribution income 21 percent from the previous year. *Id.* Employment activity was up 13 percent from the previous year and 40 percent over the previous three years. *Id.* The percentage of vested employees was declining. (J.A. 77.) The Fund was increasing benefits. (J.A. 65.)

3. The Origins of Withdrawal Liability: Troubled Plans, Declining Industries

In its 1978 Report to Congress, the PBGC expressed concern that there existed a relatively small number of multiemployer plans, about 2 percent of all such plans, which were experiencing such serious financial difficulty that they *might* terminate within five years. U.S. CODE CONG. NEWS 2924; PBGC Report, App. I, at 2-3. Another 10 percent were in such condition that they *might* terminate within ten years.³ The PBGC feared that if all of these troubled plans actually terminated, although unlikely, the cost to the insurance system would be unacceptably high—in the range of \$4.8 billion. U.S. CODE

³ *Id.* The PBGC painstakingly noted how uncertain it was about the validity of these figures, PBGC Report, at 12, 19, 138, and 139, and even stated that "it is not likely that all of these plans would terminate during the 10-year period, or even thereafter. . . ." *Id.* at 139.

CONG. NEWS 2924. The PBGC then proposed that withdrawal liability be made fixed, rather than contingent upon plan termination as it was under existing law.

The immediate purpose of withdrawal liability is to discourage employer withdrawals from financially troubled plans and to reduce the plan's UVB should withdrawal nevertheless occur. 29 U.S.C. § 1001a (Supp. V 1981); U.S. CODE CONG. NEWS 2922-23. The problem of financially troubled plans, in turn, was recognized as one arising principally in declining industries. *Id.* See 126 Cong. Rec. H3948-49, 3952 (daily ed. May 21, 1980); PBGC Brief at 8, 30.

There are two important points we would make concerning withdrawal liability under MPPAA. First, the fact of liability is *not* predicated upon any actual injury incurred by the plan, except in a limited range of cases in certain industries and in certain types of transactions. 29 U.S.C. §§ 1383, 1384 (Supp. V 1981). And, second, although MPPAA requires the payment of withdrawal liability ostensibly as a means of reducing a plan's UVB, *see* PBGC Brief at 8-9, the Act does *not* require that withdrawal liability payments be used to improve the funding status of the plan. The plan may use such funds to increase benefits or reduce the future contribution costs of remaining employers. MPPAA thus does not reduce, and may actually increase, the insurance risk to the PBGC.

SUMMARY OF ARGUMENT

The Ninth Circuit decided that the imposition of withdrawal liability upon employers withdrawing from multiemployer pension plans during the statutory retroactive period violated the employers' rights to due process of law. NAM urges that the decision be affirmed in all respects.

If MPPAA is held unconstitutional, the multiemployer pension plans of this country, operating under the aegis

of the Taft-Hartley Act, will not collapse. The great bulk of them remain financially solid. The one at bar is an example: although imposing a "withdrawal" charge on Gray the trustees were increasing benefits and funding levels. The contribution base was growing. Country-wide, trusts and related collectively bargained contracts will continue if the Act is declared unconstitutional. For the handful of funds that may encounter problems, less drastic remedies will solve their problems and not interfere with the normal stream of commerce in which businesses open, close or are transferred.

The court of appeals held the application of MPPAA to be unconstitutional in substantial measure because it required employers "to pay a sum that seriously threatens their solvency, without a specific showing of proportionate need on the part of the pension trust funds. . . ." *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502, 1513-14 (9th Cir. 1983). In this brief, NAM focuses and expands upon this aspect of the Ninth Circuit's opinion which it believes to be of particular importance in analyzing MPPAA against the standards of the Due Process Clause.

MPPAA is an extraordinary piece of legislation. In one sudden stroke it created a massive new liability, probably in excess of \$50 billion, for a large sector of the nation's private employers who for many years had agreed, pursuant to their collective bargaining agreements, to contribute to union pension funds. MPPAA donates this huge employer liability to the private purposes of the union pension funds without imposing any constraints as to its use when collected. MPPAA does *not* insure better funding of pension plans because there is no requirement that withdrawal liability actually be used to reduce plan funding obligations. In most cases, the withdrawal liability required by MPPAA is a pure windfall to the plan and can and will be used to increase benefits or reduce future costs to remaining employers. See 128 Cong. Rec. E4552 (daily ed. Oct. 1, 1982).

In truth, the great majority of multiemployer plans are well-funded, financially sound, and suffer no lasting injury as a result of employer withdrawals. When an employer is forced to pay into such plans funds substantially in excess of the contributions which it bargained and agreed upon its property is confiscated and transferred to the plan without serving the purposes Congress intended. In the widest range of its application, withdrawal liability serves no public purpose. It provides no improvement in plan funding and no reduction of the PBGC's potential liability. MPPAA is not part of the insurance system. It is an unconstitutional exaction contrary to the Due Process Clause of the Constitution.

The PBGC would have the Court hold that Congress possesses unbridled authority to pass any economic legislation that Congress believes is worthwhile. That position is premised upon an incorrectly broad reading or extension of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Turner Elkhorn* supports Congress' exercise of legislative authority as broad as that asserted by the PBGC only in cases arising from aspects of the employment relationship not involved here. For the Court to uphold the PBGC's position would be to hold that any good end justifies the means and that Congress can use its discretion unfettered in the sphere of economic regulation. It is NAM's position that the Constitution still provides checks and balances and that Congress must adhere to the Constitution and the teachings of this Court by enacting laws which accomplish a legitimate public purpose by reasonable means tailored to that end.

ARGUMENT

I. APPLICATION OF MPPAA TO GRAY VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The Ninth Circuit held that application of the MPPAA withdrawal liability provisions to employers who had withdrawn from multiemployer plans between its proclaimed "effective date," April 29, 1980, and the law's enactment date, September 26, 1980, violated their rights under the Due Process Clause of the Fifth Amendment.

The court of appeals based its ruling on several grounds:

Those employers who had withdrawn during that period did so in justifiable reliance on their collective bargaining agreements and upon existing law under which they clearly were not subject to further liability to their plans; they should not be held responsible for predicting the uncertain outcome of the legislative process. *Shelter Framing*, 705 F.2d at 1511-12. The reliance interests of the employers under the circumstances outweighed those of the plan beneficiaries. The court further found that MPPAA lacked significant moderating provisions. *Id.* at 1514. Most importantly, the court found that MPPAA imposed a severe burden upon employers "without a specific showing of proportionate need on the part of the pension trust funds." *Id.* at 1513-14.

We recognize that our argument here may raise broader questions of the constitutionality of MPPAA than arise solely from the fact that the statute was made retroactive for a period of five months. Some of the Ninth Circuit's reasons for striking down the statute's application to R.A. Gray & Co. arise solely from the fact of retroactive application, while others go to the rationality of the withdrawal liability scheme as a whole. While the PBGC attempts to draw the question before the Court narrowly, limiting the issue to the due process aspects of the stat-

ute's retroactive feature, it nevertheless asks an outright reversal of the Ninth Circuit which did not rule on the constitutionality of the Act as a whole. The effect of such a reversal would be, we fear, reinstatement of the underlying district court judgment that the Act was constitutional—and this without any appellate review of the broad question.

Implicit in virtually everything the PBGC says is its assumption that MPPAA withdrawal liability itself is rational and survives scrutiny under the Due Process Clause. The PBGC claims in its brief that *both* the imposition of liability on employers withdrawing from multiemployer plans *and* the decision to make such liability effective prior to enactment were "eminently rational legislative choices." PBGC Brief at 21-22. The Ninth Circuit expressly limited its ruling on both to the retroactive period but strongly suggested that the underlying rationale of the statute was questionable. The broad question of statutory rationality thus is forced on this Court.

We urge that this Court affirm the decision of the Ninth Circuit in all respects. If the Court reverses the court of appeals, we respectfully submit that it should remand to the Ninth Circuit for further proceedings on the remaining constitutional questions.⁴

⁴ The constitutional issues raised by employers and plan trustees in over 125 actions across the country challenging the withdrawal liability provisions of MPPA include, *inter alia*:

1. Withdrawal liability deprives employers of property without rationally serving a legitimate public purpose, thus denying the employers due process of law;
2. Withdrawal liability represents a taking of private property without a proper public purpose;
3. The Act contains standards for determination of the amount of withdrawal liability which are so vague as to deny due process;

[Footnote continued on page 11]

A. The Standard for Due Process Analysis

The Due Process Clause requires that Congress not legislate in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Shelter Framing Corp. v. PBGC*, 705 F.2d at 1510; *Nachman Corp. v. PBGC*, 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on other grounds* 446 U.S. 359 (1980). Rationality, in turn, is a function of comparing "the problem to be remedied with the nature and scope of the burden imposed to remedy that problem." *Nachman Corp. v. PBGC*, 592 F.2d at 960. Furthermore, this analysis, under circumstances involving impairment of private contracts, makes highly relevant decisions of this Court rendered under the Contract Clause of the Constitution.

NAM submits that in MPPAA Congress has imposed a massive, even monstrous, burden upon employers in order to remedy a problem which was and is minute by comparison to the solution imposed. The Ninth Circuit was correct in concluding that such a failure of balance and proportion rendered MPPAA's application irrational and unconstitutional.

B. The Rationale Of Turner Elkhorn Does Not Apply

Appellant urges ultimate reliance here upon *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), to the effect that MPPAA withdrawal liability "is justified as a rational measure to spread the costs of the employees'

⁴ [Continued]

4. The Act discriminates irrationally between different classes of employers thus denying equal protection and due process of law;
5. The Act's compulsory arbitration provisions and its presumptions in favor of the plans, violate Art. III, Sec. 1 of the Constitution, deny due process of law, and deny the employers' rights to trial by jury in violation of the Seventh Amendment.

disabilities to those who have profited from the fruits of their labor. . . ." *Id.* at 18. PBGC Brief at 20. This approach is unfounded and inappropriate here.

Turner Elkhorn upheld, against a due process challenge, legislation requiring continuing coal mine operators to pay benefits to victims of black lung disease who had left the industry prior to passage of the act. In *Turner Elkhorn*, the Court faced a situation in which thousands of former industry employees were afflicted with a debilitating disease. That disease resulted from long-term exposure to coal dust, an inherent condition of the employment largely unknown, or at least not well understood, by employers during the time in which those employees had worked. 428 U.S. at 15, 17.

The Court analogized the case to the allocation of interlocking economic rights and duties of employers and employees underlying workmen's compensation laws, citing *New York Central R. Co. v. White*, 243 U.S. 188 (1917). 428 U.S. at 15. Looking back to these basic principles, *White* makes clear that workmen's compensation laws are premised upon the implicit recognition in the employer-employee agreement that the employee may become injured or disabled as a result of his employment. 243 U.S. at 203. Where this occurs, "natural justice" supports a requirement that the employer compensate the employee in some measure for the employee's loss of earning power resulting from the physical disability. *Id.* at 203-04. This loss of earning power is seen as a loss arising from the business itself and as an actual expense of the employer's operation. *Id.* at 203.

The PBGC ignores or avoids this underlying rationale of *Turner Elkhorn*. At page 25 of its brief, the PBGC quotes from *Turner Elkhorn* a passage supporting the proposition that Congress may allocate the interlocking economic rights and duties of employers and employees regardless of contravening arrangements between them

but excises from that quotation the words "upon workmen's compensation principles analogous to those enacted here." 428 U.S. at 15. The PBGC's abridgement gives a far broader meaning to *Turner Elkhorn* than is supported by the decision itself.

MPPAA withdrawal liability is in no way meant to compensate employees for physical disabilities or loss of earning power resulting from their employment. Rather, the employer's contributions to a pension fund are simply a form of additional compensation to employees, like wages or benefits established through the collective bargaining process. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-46 (1978). Unfunded vested benefits, moreover, do not arise from any unknown, inherent condition of employment. They have always been a known factor of multiemployer plans controlled principally by the trustees of the plans—not by the employers. See *Peick v. PBGC*, 539 F. Supp. 1025, 1047 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983).

Turner Elkhorn is distinguishable too in that Congress' black lung program required the beneficiaries to prove need. An employer was required to pay benefit claims only upon proof by the employee (or his survivors) that he suffered from the disease. 428 U.S. at 10-12. MPPAA, in sharp contrast, requires potentially massive payments to pension plans without any requirement of need on the part of the pension plan or its beneficiaries. See *infra*, pp. 21-24.

In upholding Congress' black lung legislation in *Turner Elkhorn*, the Court distinguished its earlier decision in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), on grounds that

The point of black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific

need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

428 U.S. at 19. This distinction, consistent with the workmen's compensation theory on which it was based, is completely invalid here. It argues instead for reliance on *Alton Railroad* and against the application of *Turner Elkhorn*.

In bargaining with labor, an employer premises his agreement upon the total cost of an employee compensation package. This includes wages and benefits, pension fund contributions being a major component of benefits. The allocation of that total employer package between present wages, and pension contributions, health and other benefits is a matter generally left to the labor side of the bargaining process. If less is allocated to pension contributions than to current wages, this can cause multi-employer plan UVB. In effect, MPPAA penalizes employers for past allocation decisions by imposing an additional cost for past labor beyond what the employer bargained for, agreed upon, and paid. See *Allied Structural Steel*, 438 U.S. at 245-46. MPPAA thus does not allocate "an actual measurable cost" of the employer's past business to the employer. Instead, it adds a new and additional past cost which the employer never agreed to assume and for which a third party, the plan's board of trustees, has had full authority and responsibility.⁸ See *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). The reasoning and result of *Turner Elkhorn* both are inapposite here.

⁸ Until 1947 the plans were controlled solely by the unions. Even after Taft-Hartley, unions have generally dominated the trusts.

C. The Solution Is Not Rationally Related To The Problem

We turn to the most closely analogous precedent—the Court's decisions in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935). In *Alton Railroad*, *supra*, the Supreme Court held that a retroactive pension funding plan violated the employer's due process rights. The Court found the statute unconstitutional in large part because it required employers to fund pensions for thousands of persons who were not employed in the industry at the time the law was enacted. The act offended due process because it altered long-term contractual rights, requiring employers to take from future earnings to pay additional amounts for services which had been fully compensated when rendered in accordance with existing contracts. 295 U.S. at 349. It resurrected and imposed new burdens upon transactions long since past and closed. *Id.* at 350, 354. See *Shelter Framing Corp. v. PBGC*, 705 F.2d at 1512-13.

More recently, the Court struck down a Minnesota statute through which the state had attempted to impose liability upon employers for termination of their pension funds. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). The case is directly relevant to the one now before the Court. Although *Allied Structural Steel* involved state action and was decided under the Contract Clause of the Constitution, Art. I, § 10, cl. 1, the principles for determining the rationality of legislative action it articulated apply with equal force to federal action through the Due Process Clause.

As Madison wrote, "[L]aws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist, No. 44. The Founding Fathers thus adopted the Contracts Clause as a "constitutional bulwark in favor of personal security and private rights."

Id. See *Allied Structural Steel*, 438 U.S. at 245; *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934). It would, therefore, be clearly in derogation of the basic precepts of a federal government, as held by our Founders, for the legislative acts of the federal government impairing private contracts to be judged by substantially different standards than those imposed upon the states with all of their innate powers. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21-23 (1977). The courts have frequently equated analysis under the Contracts and Due Process Clauses, see *Blaisdell*, 290 U.S. at 438, 447-48; *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 41 (1940); *Perry v. United States*, 294 U.S. 330, 353-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934), and have done so specifically in the context of federal pension fund legislation, *A-T-O, Inc. v. PBGC*, 634 F.2d 1013, 1024 (6th Cir. 1980); *Nachman Corp. v. PBGC*, 592 F.2d at 959. It would strain credulity if this Court were to take the position that the standards and limitations imposed upon the states by the Contract Clause were substantially weakened as they passed through the Due Process Clause to be applied to acts of the federal government.* See *Peick v. PBGC*, 593 F. Supp. at 1040 n.31.

* The PBGC, of course, argues for just such a position. PBGC Brief at 24-27. Its supporting analysis is flawed. The PBGC refers to the constitutional debates to support its proposition that the substance of the Contract Clause was not intended to apply to federal legislation. *Id.* at 24-25. The passage cited on its face would not appear to prove as much as the PBGC would like. More importantly, the debates in question pertained to the constitution before its modification several years later by a Bill of Rights which, *inter alia*, prohibited the Federal Government from depriving its citizens of property without due process of law. Library of Congress, *The Constitution of the United States, Analysis and Interpretation*, at XXXIX (1973). The fact that several of the Court's decisions cited by the PBGC have applied a due process analysis without mentioning the Contract Clause would also seem to prove very little.

In *Allied Structural Steel* this Court spoke clearly and forcefully to virtually the same subject as that presently before the Court. In striking down Minnesota's statutory termination liability, the Court relied upon two points which are important here:

First, the statute had nullified the employer's express contractual obligations, imposing a "completely unexpected liability in potentially disabling amounts", 438 U.S. at 247, 250.

Second, it had done so without any showing by the state that this severe disruption was necessary to meet an important general social problem. *Id.*

Necessity is a vital element of reasonableness and justification. *Id.* at 242, 244. In *United States Trust Co. v. New Jersey*, the Court struck down a state statute under the Contract Clause principally because the state, even though it had an admittedly legitimate purpose for its act, nevertheless failed to show that its statute was necessary to achieve its plan. 431 U.S. at 29. The statute could not be said to be essential where less drastic modifications of the law or alternative methods would have permitted the state to achieve its goals. *Id.* As the Court emphasized, "... [A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 31. The Congress similarly should be bound to act reasonably.

1. *The Burdens Imposed On Employers Are Harsh And Oppressive*

The liability imposed by MPPAA upon contributing employers is staggering. The total amount of UVB for which employers now are responsible ranges easily into the tens of billions of dollars and probably surpasses the \$50 billion mark. PBGC Report, App. XIV at 11, 14. Congress has created a "solution" which is, in monetary terms, perhaps 10 to 25 times greater in the aggregate

than the PBGC's estimates of the scope of the potential problem. *See supra*, p. 5. The liability of individual employers may be hundreds of thousands or even tens of millions of dollars, 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982), and in some cases may exceed the total contributions made by the employer or even its entire net worth. 128 Cong. Rec. E5326 (daily ed. Dec. 18, 1982).

The actual payment of withdrawal liability may be triggered by any number of perfectly lawful business or labor actions—the sale of a business, the closing of a plant, or the employees' decertification of a bargaining unit.⁷ Even where payment of liability has not actually been triggered by a withdrawal, the contingent liability that exists must be reflected on the firm's financial statements either as a liability or as a note to the financial statement. *Peick v. PBGC*, slip op. at 57. In some cases the amounts of such withdrawal liability have been so substantial as to affect adversely the creditworthiness of the contributing employer. This "illusory" liability has limited the ability of such companies to obtain future financing and in some cases to continue current operations by triggering breaches in loan agreements. In the case of some small companies, the results of MPPAA liability has been to put them into a negative net worth position.

⁷ With respect to this latter point, it must be noted that withdrawal liability has become an economic club held over the heads of employers to prevent them from becoming non-union. The present case is an example. PBGC Brief at 14. Gray retained about 63 percent of its employees and established a single-employer pension plan for its employees. (J.A. 13-14.) A majority of the remaining 37 percent of its employees were reemployed by other contributing employers (J.A. 13). Gray was assessed liability solely because it went non-union. As a construction industry employer, Gray would have been entitled to a statutory exemption from withdrawal liability except that it continued its business activity in the area without a union contract. 29 U.S.C. § 1383(b) (2)(B)(i) (Supp. V 1981). MPPAA thus provides a method by which unions may unduly influence employers against changing their labor relationships.

MPPAA locks employers into unprofitable or even losing business operations, threatens the solvency of some, and discourages new participation in, or the formation of, multiemployer plans. The existence of withdrawal liability where it was not required has created a state of economic gridlock.

2. Liability Is Imposed Upon Employers For A Problem They Did Not Create

Withdrawal liability is not impressed upon the employer for any action or wrongdoing of the employer or condition of the workplace. Each multiemployer plan is governed by a board of trustees, composed half of labor and half of employer representatives,⁸ which has the exclusive authority to determine:

1. What benefits the fund will pay and under what conditions;
2. what funding will be required; and
3. how the trust funds will be invested.

N.L.R.B. v. Amax Coal Co., 453 U.S. 322, 333 (1981); *Peick v. PBGC*, 539 F. Supp. at 1047. The trustees are fiduciaries and at law owe their *sole allegiance to the beneficiaries of the fund*. *Amax Coal Co.*, 453 U.S. at 329-30.

The unfunded vested benefits of multiemployer plans were created by the policies and actions of the unions, of the plan trustees, of Congress, and by general economic forces—not by the employer. Yet Congress inappropriately chose to allocate responsibility to employers, rather than to the plans, the unions, continuing employers, or taxpayers.

⁸ 29 U.S.C. § 186(c) (5) (B) (1976); U.S. CODE CONG. NEWS 2921. Congress required employers to participate in the governance of these funds in particular to protect against union abuses. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 n. 13 (1981); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959).

3. *MPPAA Retroactively Impairs Settled Contractual Expectations*

The harshness and patent unfairness of the Act's allocation of responsibility result from its inherently retrospective nature. There is double retroactivity. Not only is the statute itself applicable to pre-enactment withdrawals, made in reliance upon then-existing law, but it is also retroactive in that it imposes new compensation requirements for past employment relationships. As in *Alton Railroad*, the legislation requires the employer to go back, perhaps as far as 1947, to reopen all of its fully settled employment relationships and to pay considerably more for them. 295 U.S. at 350. In this effect it constitutes a direct abrogation of the employer's collective bargaining agreements. Under those agreements the employer had a defined rate of contribution for its employees and no termination penalty; the employer was not required to provide full funding of all benefits established by the plan trustees. The employer's contribution obligations formed a known, fixed component of its operating costs upon which it based its prices and the overall conduct of its business. MPPAA nullifies those important rights and interests and thereby works a "severe, permanent, and immediate change" in the employer's historical contracts which cannot be justified. *Allied Structural Steel*, 438 U.S. at 246-47.

Moreover, as the Court noted in *Allied Structural Steel*, the Act destroys the employer's reliance on an aspect of the economy in which consistency is particularly important. 438 U.S. at 246-47. Pension plans depend upon the accumulation of large sums over long periods of time to achieve their designated purpose. *Id.* The amounts set aside to fund them are the result of careful calculations and balancing of economic and other risk factors. *Id.* at 247. Sudden, drastic changes in the legal rules governing these funds may threaten the entire system. *Id.*

If MPPAA's scheme is not unconstitutional in its drastic revision of settled contractual expectations, it ultimately fails because it is not a rational means of achieving Congress' purpose.

4. *The Remedy Is Not Justified By And Does Not Address The Problem And Is, Therefore, Arbitrary And Irrational*

In *Allied Structural Steel*, the Court found nothing to show that the legislation was necessary to solve a "generalized social problem" and struck down the statute. 438 U.S. at 247, 250. In *United States Trust*, the legislative solution adopted by the state was held unconstitutional chiefly because it was more drastic than was necessary to solve the problem. 431 U.S. at 31. See also *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934).

a) Few, if Any, Multiemployer Plans Need Withdrawal Liability

As we have shown above, Congress' admitted purpose in creating withdrawal liability was to protect employee benefits by discouraging employers from withdrawing from multiemployer plans. Where withdrawal nevertheless occurred Congress intended that the employer pay an allocated share of the plan's UVB in order to improve its funding and reduce the likelihood of insolvency. Employer withdrawal was in turn recognized as a problem associated virtually exclusively with financially distressed plans in declining industries. See *supra*, p. 6. The legislative solution to the perceived problem—imposition of absolute withdrawal liability to discourage *all* withdrawals from *all* plans having any measure of UVB—was arbitrary overkill. The fact that Congress did not require that withdrawal liability even be used to reduce a plan's UVB makes the statute *all* the more irrational. It does not eliminate risk to the PBGC.

The vast majority of multiemployer plans were and are well funded, financially strong and not in any perceptible

danger of insolvency.⁹ A prime case in point is the plan involved here. The mere fact that a plan has unfunded vested benefits does not mean that it is financially unsound or in danger of insolvency. The PBGC's 1977 study found that 60.2 percent of all multiemployer plans were 50 percent or more funded (i.e., plan assets represented 50 percent or more of its vested benefits). PBGC Report, App. XIII at 46. Another 30.7 percent of all plans, were 25-49 percent funded. *Id.* In contrast, the report considered a high potential for termination to exist only where a plan was less than 15 percent funded. PBGC Report, at 160. The problem of financially troubled multiemployer plans was not a generalized one; it was quite specific to a relative few plans.

**b) Imposition Of Liability For Withdrawal From
A Healthy Plan Is Not A Rational Means To
A Legitimate Public Purpose**

Congress imposed withdrawal liability on *all* employers contributing to multiemployer plans (except those in the specially exempt industries such as construction, 29 U.S.C. § 1383 (Supp. V 1981)) without regard for the financial condition of the plan, the status of the industry, or the actual effect of withdrawal upon the particular plan, and without requiring that withdrawal liability actually be used to improve the funding position of the plan by reducing its UVB. This is irrational; it does not achieve the legislative purpose.

The crucial questions are what are the effects of requiring an employer to pay withdrawal liability to a sound plan and whether such requirement is reasonably related to a legitimate congressional purpose. An employer's withdrawal from a plan will seriously weaken

⁹ See PBGC Annual Report, 21 (1982); 128 Cong. Rec. E4552 (daily ed. Oct. 1, 1982); Martin E. Segal & Co., A Survey of the Funded Position of Multiemployer Defined Benefit Plans (1983).

that plan only when it causes a substantial diminution in the fund's contribution base which persists over time. This will occur only when the industry as a whole is in substantial decline.¹⁰ And, even in the case of a plan in a declining industry, the plan's actuaries are required to provide for more rapid funding to the extent believed necessary to offset the decline in contributions.

Not only does a withdrawal not necessarily injure a plan, it may actually improve its funding. For example, if unvested employees in a plan elect to change their union representative, the substantial contributions made to the fund on their behalf would be lost and would produce a surplus to the fund.

Where an employer's withdrawal does not actually injure the contribution base or funding position of the plan, the plan does not need the infusion of withdrawal liability funds in order to fulfill the legislative purpose of preventing plan insolvency and thereby protecting vested employee benefits. In such cases, withdrawal liability is a windfall to the plan, nothing more nor less than a mandatory confiscation and transfer of the employer's property to the plan without service of any demonstrated public purpose. Such money paid into the fund need not, under the statute, be used to pay promised benefits or reduce UVB. Rather it may be used to *increase* benefits or *reduce* the future contribution levels of remaining employers. The withdrawn employer's property is thus used to benefit other employers or the employees of other employers. This was a feature of the plan condemned by this Court in *Alton Railroad*. 295 U.S. at 350, 360.

¹⁰ One of MPPAA's more discouraging ironies is that the statute itself, through the spectre of withdrawal liability, may be dissuading new employers from entering into plans, thus blocking the regeneration and growth always thought to be one of the great strengths of such plans. 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982); 128 Cong. Rec. E5325-26 (daily ed. Dec. 18, 1982).

MPPAA itself implicitly recognizes that withdrawal liability in the absence of a corresponding injury to the pension plan is inequitable. U.S. CODE CONG. NEWS 3004; *Peick v. PBGC*, 539 F.Supp. at 1051. The Act provides special rules, narrowly applicable only to certain industries and types of transactions, in which withdrawal liability is not recognized where there is no significant injury to the plan's contribution base. 29 U.S.C. §§ 1383, 1384 (Supp. V 1981). Why this should not be a principle of general application is difficult to comprehend.

The directly confiscatory nature of withdrawal liability and its demonstrable lack of public purpose in such a broad range of its application also raise serious questions under the Taking Clause of the Fifth Amendment. The Ninth Circuit found it unnecessary to reach this question. 705 F.2d at 1515. We submit, however, that the Taking Clause further supports the court of appeals' conclusion that MPPAA is unconstitutional in this case.

In sum, the basic failure of MPAA is that it creates a broad class of cases, probably a great majority of the cases arising under the Act, in which substantial withdrawal liability is imposed upon employers, many of whom can ill afford it, without regard for the actual effect of the withdrawal upon the plan, hence without regard for whether the liability is necessary to achieve the legislative purpose. It permits pension plans to assess and collect from employers large amounts of money which they simply do not need and do not use to fund vested employee benefits. The Fund's assessment of withdrawal liability against Gray in this case is an eloquent statement on the fundamental arbitrariness and irrationality of MPPAA.

5. Congress Could Have Pursued A More Moderate Course

This is an instance, such as that in *United States Trust*, where Congress could have adopted a more moderate course than it did to achieve its legitimate purposes.

431 U.S. at 29-31. Rather than impose across-the-board liability on all withdrawals from all multiemployer plans, Congress could have focused a solution upon those plans where the real problems existed. This is a constitutional requirement of rationality and reason. *Allied Structural Steel*, 438 U.S. at 242, 244.

Liability could have been made contingent upon, and proportional to, the actual injury inflicted upon the plan, as measured by the contribution base or some other quantitative criteria. Liability might have been premised upon withdrawal from a "failing plan" as defined by such quantitative criteria as the PBGC itself used in 1978 to predict plan terminations. See PBGC Report at App. XIV. The statute might have provided, instead of a retroactive period, a gradual phase-in to ameliorate its harsh results.¹¹ See *Allied Structural Steel*, 438 U.S. at 247, 249 n.23.

It is no answer to say that employers are subject to the unbridled discretion of Congress in all matters of economic regulation. *United States Trust* makes clear that deference to the legislature has limitations. 431 U.S. at 22-23, 30-31. *United States Trust* also teaches that complete deference to a legislative assessment of reasonableness and necessity is not appropriate where the State's self-interest is at stake. 431 U.S. at 26. Such is the case here. MPPAA was passed primarily from the perspective of protecting the PBGC, a government entity,

¹¹ The so-called mass withdrawal problem perceived by Congress and offered as justification for retroactive application was a mirage. Employers cannot unilaterally withdraw from a multiemployer plan or terminate a collective bargaining agreement without breaching the collective bargaining agreement or committing an unfair labor practice. 29 U.S.C. § 158 (1976); *Chicago Magnesium Castings Co. v. N.L.R.B.*, 612 F.2d 1028, 1034-35 (7th Cir. 1980); *N.L.R.B. v. R.O. Pyle Roofing Co.*, 560 F.2d 1370, 1371 (9th Cir. 1977). Employers thus could not legally have withdrawn from their plans without the consent of labor, absent bankruptcy or other extraordinary circumstances.

so that it would never be faced with doing the job for which it was created—providing insurance coverage for benefits.

II. THE COURT WILL NOT DEBILITATE MULTI-EMPLOYER PENSION PLANS IF IT AFFIRMS THE DECISION BELOW

Should the Court affirm the Ninth Circuit's decision it will not radically affect the multiemployer pension plan system. In the first place, the Ninth Circuit expressly limited its decision to the retroactive period and a similarly narrow affirmance would thus deprive plans of the relatively small amount of liability assessed for withdrawals occurring in that five-month period. There is no allegation from the PBGC that this would cause the insolvency of any plan or an unmanageable burden for the PBGC.

Even if the Court were to consider the broader constitutional issues and to strike down the statute on those grounds, such a ruling would not cause widespread adverse consequences for the multiemployer insurance system or for multiemployer plans generally.

The elimination of withdrawal liability would not adversely affect the multiemployer system in that the vast majority of plans are financially sound, PBGC, *Annual Report 1982* at 21, and withdrawal liability assessment merely constitutes windfalls for them. Such plans would continue to operate as before and would continue to be financially sound. In fact, striking down this liability would eliminate a serious impediment to new employees joining and stabilizing or increasing the contribution base of multiemployer plans. It would relieve the economic gridlock caused by withdrawal liability.

As for the small number of multiemployer plans in declining industries which may have imminent financial problems, the PBGC is in a position to assist them, *see*

PBGC, *Annual Report 1982*, and, we submit, the pre-MPPAA system would be reinstituted.

NAM and its member companies feel strongly that pension obligations should be taken seriously and fulfilled. It is inappropriate, however, to have arbitrary and irrational legislation which impairs the future of the defined benefit pension program in this country. Unless the Court clearly articulates a standard by which pension legislation is to be judged and by which Congress is to act in passing pension legislation in the future, the private pension benefit system in the United States will fall under repeated attack and be subject to quick-fix, arbitrary and irrational schemes which will only further jeopardize defined benefit pensions for retirees and those employees who are presently working and earning credit for their future pensions.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

JAN S. AMUNDSON

General Counsel

GARY D. LIPKIN

QUENTIN RIEGEL

Assistant General Counsel

NATIONAL ASSOCIATION OF
MANUFACTURERS

1776 F Street, N.W.

Washington, D.C. 20006

(202) 626-3860

CHESTER W. NOSAL *

JOHN R. KEYS, JR.

WINSTON & STRAWN

2550 M Street, N.W.

Washington, D.C. 20037

(202) 828-8400

*Counsel for Amicus Curiae,
National Association of
Manufacturers*

* *Counsel of Record*

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L. STEVAS.

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No. 83-245

In the
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

vs.

R.A. GRAY & COMPANY,
Appellee

On Appeal From the United States Court of Appeals
For the Ninth Circuit

**BRIEF OF NATIONAL
ASSOCIATION OF WHOLESALE-DISTRIBUTORS
AS AMICUS CURIAE IN SUPPORT OF APPELLEE**

HAROLD T. HALFPENNY
LOUIS R. MARCHESE
JAMES F. FLANAGAN
NEIL J. KUENN
111 West Washington Street
Chicago, Illinois 60602
*Attorneys for National
Association of
Wholesaler-Distributors*

HALFPENNY, HAHN & ROCHE
111 West Washington Street
Chicago, Illinois 60602
Of Counsel

January 10, 1984

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the constitutional guarantees of due process in matters involving Congressional passage of legislation on a retroactive basis. The primary question is:

- I. Whether the retroactive provisions of the Multiemployer Pension Plan Amendments Act deny due process by impairing existing and vested rights which have been exercised prior to enactment.
- II. A closely related question is whether the legislative process denies the opportunity of fair notice to predict the exact content of future laws with retroactive provisions so as to interfere with the constitutional right to rely upon and act within the law as it exists prior to passage of such retroactive legislation in the exercise of a vested right.

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IN THE
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Appellee

On Appeal From the United States Court of Appeals
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**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

National Association of Wholesaler-Distributors, a national trade association, respectfully moves this Honorable Court for leave to file the attached brief as amicus curiae. The attorneys of record for the Appellant and the Appellee have consented to such filing.

The National Association of Wholesaler-Distributors (NAW) is a federation of approximately 122 national

wholesale-distribution trade associations representing, in the aggregate, over 50,000 employers nationwide. Participating in this brief amicus with NAW are Woodworking Machinery Distributors Association, Wine and Spirits Wholesalers of America, National Building Materials Distributors Association and National Wholesale Drug-gists' Association.

Wholesale-distribution is a critical link in the market-ing chain with 1982 sales in excess of \$1.4 trillion, pro-viding employment of 5.4 million Americans at over 300,-000 locations throughout the country. While the compo-site sales and employment statistics attest to the vital role of wholesale-distribution, the fact is that the vast majority of firms in the industry tend to be small to medium, closely held, family owned businesses. NAW member companies are subject to the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

The decision in this case is one which transcends in im-portance the interest of the immediate litigants. The ability of the small businessman to make decisions based upon current law is of paramount importance. In today's economic environment, the retroactive application of changes in the law can have a severe financial impact not only on past and completed transactions, but on future decisions as well.

In view of these facts, Petitioner believes that an analysis of the issues by counsel representing the whole-sale-distribution industry will be helpful to this Court. Therefore, Petitioner respectfully requests leave to file

instantly its brief urging affirmance of the decision of the United States Court of Appeals, Ninth Circuit, and in support of R.A. Gray & Company, Appellee herein.

Respectfully submitted,

HAROLD T. HALFPENNY

LOUIS R. MARCHESI

JAMES F. FLANAGAN

NEIL J. KUENN

111 West Washington Street
Chicago, Illinois 60602

*Attorneys for National
Association of
Wholesaler-Distributors*

HALFPENNY, HAHN & ROCHE

111 West Washington Street
Chicago, Illinois 60602

Of Counsel

IN THE
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On Appeal From the United States Court of Appeals
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**BRIEF OF NATIONAL ASSOCIATION OF
WHOLESALE-DISTRIBUTORS AS AMICUS CURIAE**

SUMMARY OF THE ARGUMENT

I.

Constitutional guarantees of due process impose substantial restrictions on Congressional power to enact legislation on a retroactive basis. Where the retroactive provisions of a statute impair existing and vested rights which have been exercised prior to enactment, due process is denied. Only in strictly limited situations involving

the exercise of emergent or police powers have any retroactive invalidations of vested rights been upheld. Due process requirements are of the essence and are controlling in any determination of the validity of statutory enactments with retroactive application. The Multiemployer Pension Plan Amendments Act cannot be characterized as an exercise of emergent or police powers. The Act denies due process by retroactively invalidating the exercise of vested rights and by imposing new obligations with respect to transactions already past.

II.

The elongated, deliberative and inconstant legislative process by which the Multiemployer Pension Plan Amendments Act became law did not afford opportunity for fair notice to predict the exact content of its final retroactive provisions. Clairvoyance is not an ingredient of reasonable reliance. Without fair notice of future laws with retroactive provisions, a party may reasonably rely upon and exercise vested rights, rights within the law as it exists at the specific point in time of such exercise.

ARGUMENT

I

THE RETROACTIVE PROVISIONS OF THE MULTI-EMPLOYER PENSION PLAN AMENDMENTS ACT DENY DUE PROCESS BY IMPAIRING EXISTING AND VESTED RIGHTS WHICH HAVE BEEN EXERCISED PRIOR TO ENACTMENT.

Courts and commentators have repeatedly asserted that the constitutionality of retroactive legislation usually turns on the issue of due process. Several factors affect this constitutional calculus under the due process clause. Such factors include the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right and the nature of the right which the statute alters.

Factors favoring retroactivity generally include surrounding circumstances of an emergency nature, such as the exercise of police power or war powers. Counter-vailing considerations include the extent of reliance upon existing law and the reasonableness of such reliance, the nature of the right affected by the legislation and the extent of abrogation of that right. Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 Colum. L.Rev. 1105, 1111-1113 (1963).

Where the statute does not represent a legislative exercise of police or emergent power and where there is a reasonable reliance on existing law in the exercise of a vested right, a retroactive invalidation of the exercise of that vested right is a denial of due process.

A retroactive law is one which takes away or impairs rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already past. *Pan Am Petroleum Corp. v. Gibbons*, 168 F.Supp. 867 (D.C. Utah, 1958), *Aff'd* 262 F.2d 852 (10th Cir. 1958). Such legislation has not been favored and will be given retroactive effect only where it clearly does not impinge upon constitutional protection. *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412 (D.C. MD. 1947), *Aff'd* 168 F.2d 58 (4th Cir. 1948). In *Seese*, the court clearly distinguished between rights given by statute and basic vested property rights that arise independent of statutory enactment. In that case rights to overtime pay under an Act of Congress that had been modified to change the specific statutory overtime pay rights at issue were the subject of the litigation. The court held that the rights sued on were *not vested rights, protected by the fifth amendment*, but instead were rights given by statute and thus subject to subsequent legislative enactment extinguishing such rights.

Thus, vested, protected property rights were and have been accorded superior priority in any determination of due process guarantees. In *Lynch v. United States*, 292 U.S. 571 (1933), this court ruled that private contract rights under war risk insurance were protected against a repealing Act holding that the Due Process Clause prohibits the Congress from annulling them unless within the police power. Reference was made to the sound principle of law found in decisions made in *Duke Power Co. v. South Carolina Tax Commission*, 81 F.2d 513 (4th Cir. 1936) and *Wright v. Union Central Life Insurance Company*, 311 U.S. 273 (1940) that

"It is a sound principle of constitutional law that retroactive legislation in general will not be allowed to impair rights which can truly be said to be vested rights of a nature constituting property rights."

The distinction of permissible retroactive application in matters involving exercise of the police power is an important one. In *Usery v. Turner Elkhorn Mining, Co.*, 428 U.S. 1 (1976), a mining safety law that imposed liability on employers for disabilities incurred by employees prior to the date of enactment of the statute was upheld by this court as a statute that was remedial in nature. The statute in question was found to be a rational measure, taken under the police power, where an overwhelming public interest was present.

The case of *Darlington, Inc. v. FHA*, 142 F.Supp. 341, (E.D. S.Car. 1956) *Rev'd on other grounds*, 352 U.S. 977 (1957) is particularly pertinent on this point. In that case, a 1954 amendment to the National Housing Act that restricted the use of rental units for transient purposes and which was enacted subsequent to the chartering of the rental corporation and the transient renting of its units, was held not to have retroactive application to the transient rentals prior to enactment. The decision reiterated the basic constitutional principle that a statute cannot validly create new obligations with respect to past transactions. The court noted that the case did not involve the legislative exercise of police power—war power—zoning laws—tariff laws—export and import licensing—emergent or tax legislation, each of which had been the basis for upholding a retroactive feature of a law.

Instead the court said, at p. 351, that

"To open an avenue for retroactive or retrospective laws in the field of contract not dealing with police, war or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects *In substance, there must be a stopping point somewhere*" (Emphasis supplied)

That stopping point is particularly visible in the retroactive invalidation issue now before this court. There is no exercise of police, war or emergent powers here. In its decision, the Ninth Circuit Court of Appeals included a finding that. . . .

"The withdrawal liability imposed on the employers for their pre-Amendments Act termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans. Those withdrawing prior to enactment of the Amendments Act were still contingently liable under ERISA" *Shelter Framing Corporation v. Pension Benefit Guaranty Corporation*, 705 F.2d 1502 (9th Cir., 1983), at page 1514

The critical issue then is whether any law not based on emergent or police power consideration should be granted retroactive effect where the application of the law acts to impair existing and vested rights.

Where an employer's obligation under a collective bargaining agreement to contribute to a pension plan terminates by reason of non-renewal of the collective bargaining agreement, that employer has a fixed right of

present or future enjoyment to discontinue such contributions; an existing and vested right. Where that vested right is retroactively taken away by subsequent legislative enactment, there is an unconstitutional impairment of that vested right.

A statute may not be given retroactive application if its effect will be the impairment of a vested right. *Rios v. Jones*, 323 N.E.2d 380 (1974), *Rev'd* 348 N.E.2d 825 (1976), *App. Dism'd* 429 U.S. 934 (1976). Adoption of a new law can have no retrospective operation so far as vested rights are concerned. *Lubezny v. Ball*, 53 N.E.2d 988 (1944), *Rev'd* 59 N.E.2d 645 (1945).

Where, as in the case before the court, the statute not only retroactively invalidates an act that was within the law when taken but also adds an obligation that did not exist at the time the particular action was taken, the denial of due process is magnified. Taking away one individual's property and giving it to another without due process of law is beyond the sphere of the legislative authority of both the states and the nation. *Osborn v. Nicholson*, 80 U.S. 654 (1871).

The standards applied to determine whether an undue injury would result from retroactive application generally involve consideration of whether there has been an abrupt change in law, whether that change results in substantial prejudice and whether there has been reliance on prior rules.

It is respectfully submitted that an employer is in fact acting in reliance upon prior rules (i.e. rules in existence at the time of action but which are thereafter changed on a retroactive basis) where that employer exercises a right to terminate a plan which right exists

at the precise moment of such exercise. Such a reliance cannot be considered unreasonable where, as in this matter, legislation may be pending but the final exact content of such legislation cannot reasonably be anticipated at that time. The deliberative legislative process involved in enactment of the Multiemployer Pension Plan Amendments Act did not afford an opportunity of fair notice to predict the exact contents of the law as it eventually passed. Passage of any law being considered by Congress cannot be said to be a certainty. Prior legislative experience indicates that very few bills considered by Congress actually become law and even fewer become law in the exact form and substance as originally introduced.

At the point in time of exercise of the vested right, the statute had not been passed, nor could it be said that a definite retroactive date would be or had been firmly established. Under such circumstances, it is entirely reasonable to expect that one may act in reliance on the rules in existence at that time; and that a legislative attempt to retroactively invalidate that action cannot be considered valid.

That there has been an abrupt change in the law is also without question. In commenting on the prior regulation of pension plans, the court below stated that:

“Subjecting parties to some risk of further regulation should not, however, require them to anticipate drastic legislative changes which extract a heavy fine for action taken before the changes win Congressional approval.” *Shelter Framing Corporation v. Pension Benefit Guaranty Corporation*, 705 F.2d 1502 (9th Cir. 1983).

The legislative change insofar as its retroactive application is concerned is indeed abrupt and drastic. In one fell swoop it rolls back existing and vested rights, negates actions taken in reasonable reliance on existing law and creates liabilities where none existed at the time of exercise of such vested rights. Retroactive laws are unconstitutional if they disturb or destroy existing or vested rights as by arbitrarily recreating rights or liabilities already extinguished by operation of law. *Lundquist v. Coddington Bros., Inc.*, 202 F.Supp. 19 (W.D. Wis. 1962).

In *Lundquist*, an Act of the Wisconsin legislature which attempted to revive a cause of action against which a previous statute of limitations had run prior to the effective date of the Act was struck down as an invalid retroactive application of law.

While it is recognized that the constitutional inhibition against laws retrospective in operation does not mean that a statute relating to past transactions can never be constitutionally enacted. Nevertheless due process demands that no law can be allowed to operate retroactively so as to affect past transactions in such a manner as to substantially prejudice the rights of interested parties. Where a right has matured by reason of its lawful exercise, retroactive invalidation is indeed an abrupt and drastic change in the law such as to deprive the exercising party of due process. An abrupt and drastic retroactive change in a law that has been reasonably relied upon is unreasonable, arbitrary and oppressive where it results in substantial prejudice to the party who has exercised that vested right.

The retroactive application to a security interest taken before the date of signing of the new Bankruptcy Code of that Code's avoidance of non-possessory, non-purchase money security interest in personal and household goods has been held to be substantially prejudicial and to constitute a deprivation of due process. *In Re: Pierce*, 4 B.R. 671 (1980). Statutes have been held invalid where they retroactively authorized a change in the preferential standards of holders of preferred shares in a corporation *Wheatley v. A.I. Root Co.*, 69 N.E.2d 187 (1946) or required increased payments for increased periods of time because of unemployment occurring prior to enactment of the statute *General Industries Co. v. Jones*, 100 N.E. 2d 703 (1950). A statute which interferes with rights which have vested prior to its passage was declared unconstitutional retroactive in *Wood v. J.P. Stevens & Co.*, 256 S.E.2d 692 (1979).

In each of these cases, a statutory attempt to retroactively invalidate an existing and vested right was struck down. The public interest in maintaining stability in the application of laws governing that right was considered paramount. Inequities imposed by retroactive application of law must be weighed and where a decision favoring retroactive effect does produce substantial inequitable results there is ample basis for avoiding the injustice of retroactivity.

II

THE DELIBERATIVE LEGISLATIVE PROCESS DOES NOT AFFORD AN OPPORTUNITY OF FAIR NOTICE TO PREDICT THE EXACT CONTENT OF FUTURE LAWS WITH RETROACTIVE PROVISIONS THEREBY INTERFERING WITH THE CONSTITUTIONAL RIGHT TO RELY UPON AND ACT WITHIN THE LAW AT THE TIME OF EXERCISE OF VESTED RIGHTS.

The Constitution vests the legislative power of the nation in the Congress of the United States. By its very nature the process of legislating in today's complex commercial-industrial society requires extensive and exhaustive deliberation of the many issues that arise from even the simplest legislative proposals.

Before a bill becomes law it will have traveled on a Congressional journey that starts with introduction of the bill in one house; reference to a subcommittee and/or a committee of that house; report to and action on the floor of that house; transfer over to the other house with reference to a subcommittee and/or a committee of that other house; report and floor action in the other house; possible reference to a conference committee of both houses; floor action in both houses on the conference committee report and finally enactment into law upon signature by the President. The end result of such an extensive and exhaustive legislative process is not so predictable as to permit a cataloging of permitted actions during the pendency of the legislative proposal with any degree of certainty.

The legislative history of the Multiemployer Pension Plan Amendment Act, (*Leg. History - P.L. 96-364*) is particularly illuminating. The first formal introduction of

the legislation that was to become law, albeit a different form and content than that originally introduced, took place on May 3, 1979.

Introduction of the bill was preceded by a series of studies and proposals made by the Pension Benefit Guaranty Corporation to Congress. In September of 1977, PBGC submitted to Congress a study of the potential costs of plan termination insurance for multiemployer plans. In July of 1978 another study was submitted and in February of 1979 a letter was sent to Congress by PBGC recommending legislative action. These studies and recommendations precipitated considerable Congressional debate on the issues involved in multiemployer plan terminations.

When the bill was finally introduced in May of 1979, it included among its many provisions, an effective date for withdrawal liability that was proposed to be retroactive to February of 1979. The bill was considered by the House Education and Labor Committee which amended the bill and reported it out on April 3, 1980. The bill was also considered by the House Ways and Means Committee which amended the bill and reported it out on April 23, 1980. In the Senate the Labor and Human Resources and Finance Committee amended and reported the bill on July 24, 1980. This Senate Committee found the originally proposed effective date to be unnecessarily harsh and amended the bill to change the effective date from February of 1979 to April 29, 1980, the date eventually enacted into law when the bill became a law on September 26, 1980.

The bills reported by the Committee were different in a number of respects from the original PBGC pro-

posal. The House passed one version of the bill and the Senate passed another. In conference, each House accepted part of the other's changes and eventually the bill became law with the April 29, 1980 retroactive date on withdrawal liability. Considering the legislative history of the Multiemployer Pension Plan Amendment Act, the court below found that it "was not certain . . . that the Amendments Act would be enacted and would have a retroactive effect." *Shelter Framing Corporation v. Pension Benefit Guaranty Corporation*, 705 F.Rep.2d 1502 (9th Cir. 1983) at page 1511.

An examination of the "scorecard" for that particular Congressional session is most revealing. In the 96th Congress, 14,592 bills were introduced. Of these, 736 or approximately 5 per cent became law. During consideration of that 5 per cent and indeed, during consideration of the remaining 95 per cent that did not become law, there existed a reasonable uncertainty as to obligations under the law which uncertainty was constantly enlarged upon and magnified as the bills being considered were changed in the normal "give and take" of a legislative session. Fair notice of what provisions a law will contain when it is eventually passed becomes virtually impossible under the circumstances.

In the business world today, an individual must possess ingenuity, industry and tenacity in order to survive and build the business. This is especially true of small business from which so much of the growth of the national economy naturally flows. However, no business, large or small, can reasonably be expected to possess the powers of clairvoyance necessary to make business decisions that will enable it to comply with the law as it may be today; and as it may be today when changed by a law

that may or may not be passed tomorrow; but with retroactive effect. To require decisions to be made and actions to be taken that can be retroactively invalidated by a subsequent enactment of law is to totally paralyze all commercial activity, to unreasonably interfere with vested property rights and to freeze in perpetuity (or at least until Congress may act) the status quo, depriving the party or parties so affected of due process of law.

In *Louisville Joint Stock Land Bank v. Radford* 295 U.S. 555 (1934) where an Act of Congress passed subsequent to an exercise of a vested right by way of foreclosure was involved, this court refused to permit retroactive application of the Act, stating at p.589 that

"Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgage in specific property, another provision of the Constitution is controlling. The bankruptcy power, like the other great substantive powers of Congress is subject to the fifth amendment."

Characterizing the operation of the Act to the particular invalidation of the vested right this court went on to say at p. 590

". . . . the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. Under the bankruptcy power, Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. . . . but it can not take for the benefit of the debtor rights in specific *property acquired by the Creditor prior to the Act.*" (Emphasis added)

The Due Process clause remains as a fundamental limitation to ensure against governmental actions that will effect a confiscation of property rights. Where, as in the matter now before this court, and in all such matters involving the retroactive application of the Multiemployer Pension Plan Amendments Act to *rights exercised prior to passage of the Act*, the guarantees of due process must prevail over the limited powers of Congress to legislative retroactively.

The due process clause clearly places greater limitations upon Congressional power to legislate retrospectively rather than prospectively. *Pension Benefit Guaranty Corp. v. Quimet Corp.* 470 F.Supp. 945 *aff'd* 630 F.2d 4, *Cert. denied*, 450 U.S. 914 (1981).

In this case, while ruling in favor of the Pension Benefit Guaranty Corporation on the basis of specific factual issues, the court's comments on the evaluation of the facts before it was to the effect that if it could have been shown that application of the retroactive concept was arbitrary and unreasonable, a different result could have been obtained. Due process of law is of the essence, and no exercise of governmental power can be countenanced if it denies due process to the person affected. Due process operates as a limitation on the power of the legislature to enact laws which are oppressive, arbitrary or unreasonable. A major purpose of the due process clause is to restrain arbitrary and vindictive legislation by seeking to assure that individuals are given fair notice of what the law is and what the effect of their actions will be.

Where there is a lack of fair notice, a fundamental constitutional issue arises. That is, whether Congress

can in the exercise of its legislative power and subject to the limitations imposed by the requirements of due process, retroactively invalidate actions of individuals that were valid when originally taken.

It is respectfully submitted that the legislative route of the Multiemployer Pension Plan Amendments Act did not afford an opportunity of fair notice to predict the exact content of what the law was to be and what the effect of individual actions taken during the deliberative legislative process would be. Legislative consideration of the substantive content of the bill that would eventually become law occupied, at the least, a three year period. The legislative body itself found that the use of one retroactive effective date would be unnecessarily harsh and acted to change that date but in doing so, nevertheless, retained the equally harsh retroactive feature. The use of any retroactive feature that affects the exercise of vested rights, which are undertaken with reasonable reliance on existing law, constitutes a denial of due process. To require individual action or inaction based upon a prediction of future legislative action, especially where the legislative process is one that encompasses a minimum of three years, is a magnification of the denial of due process where that legislative act retroactively invalidates vested rights. Such a retroactive feature must be set aside.

This court, as the ultimate protector of due process, has denied retroactive application of a law where to do otherwise is to impair existing and vested rights. The right of appellee herein to take the action taken with respect to the particular pension plan involved at the time it was taken cannot reasonably be questioned. The power of Congress to retroactively invalidate that action is definitely a serious constitutional question.

CONCLUSION

It is respectfully submitted that the retroactive invalidation of completed acts which constitute the exercise of vested rights produces substantive inequities that violate the demands of due process; that the Ninth Circuit Court of Appeals decision is a logical and reasonable determination of applicable law; and that the decision should be affirmed.

Respectfully submitted,

HAROLD T. HALFPENNY

LOUIS R. MARCHESE

JAMES F. FLANAGAN

NEIL J. KUENN

111 West Washington Street

Chicago, Illinois 60602

Attorneys for National

Association of

Wholesaler-Distributors

HALFPENNY, HAHN & ROCHE

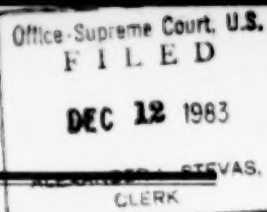
111 West Washington Street

Chicago, Illinois 60602

Of Counsel

January 10, 1984

No. 83-245



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
v. *Appellant,*
R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court
of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
COORDINATING COMMITTEE FOR MULTIEMPLOYER
PLANS IN SUPPORT OF APPELLANT, PENSION
BENEFIT GUARANTY CORPORATION**

GERALD M. FEDER *
NIK B. EDES

FEDER & EDES
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515

*Attorneys for Amicus Curiae
National Coordinating Committee
for Multiemployer Plans*

*(Counsel of Record)

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

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**BRIEF AMICUS CURIAE OF THE NATIONAL
COORDINATING COMMITTEE FOR MULTIEMPLOYER
PLANS IN SUPPORT OF APPELLANT, PENSION
BENEFIT GUARANTY CORPORATION**

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Appellant. Copies of letters written by counsel for Appellant and Appellee granting the parties consent to this submission are on file with the Clerk of the Court.

**INTEREST OF THE NATIONAL COORDINATING
COMMITTEE FOR MULTIEMPLOYER PLANS**

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), pursuant to the written consent of the parties, submits this brief to urge reversal of the decision of the Court of Appeals below holding that

the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA")¹ are unconstitutional to the extent Congress provided that they affect transactions occurring prior to the date of enactment. The NCCMP is a tax-exempt, nonprofit corporation organized to represent the interests of the more than eight million workers who participate in collectively-bargained multiemployer plans. The NCCMP's affiliates include over 140 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans.

The NCCMP actively participated throughout the development and Congressional consideration of the MPPAA. It is our belief that such legislation, including the provisions challenged here, is essential to the stability of multiemployer pension plans and to the viability of the federal pension benefit guaranty program established by Title IV of ERISA. During the period between the Congressionally mandated effective date of MPPAA and the date of the law's enactment, numerous employers who had agreed to contribute to multiemployer pension plans terminated their affiliation and withdrew from such plans. A large number of these employers have filed lawsuits challenging the constitutionality of MPPAA's retroactivity in an attempt to avoid the financial liability which they incurred under MPPAA for withdrawing from those plans. The liability of the withdrawn employers who have filed suit is substantial, amounting to almost 65 million dollars. Should the Ninth Circuit's decision be permitted to stand, the result will be to transfer that liability to employers who are still contributing to plans. Moreover, if the remaining employers cannot fund

¹ Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980). The withdrawal liability provisions of the MPPAA, which added Sections 4201 through 4225 to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), are codified at 29 U.S.C. §§ 1381-1405.

the liability, the result will be to disrupt severely the operation of such plans and endanger the retirement security of the millions of American workers who participate in them.

In view of applicable page limitations, our *amicus* brief will be confined to one legal issue—whether the retroactive withdrawal liability provisions of MPPAA violate the Due Process Clause. We rely upon the brief of the Pension Benefit Guaranty Corporation (“PBGC”) for the factual statement of this case and a detailed description of the relevant legislation.

SUMMARY OF ARGUMENT

The Ninth Circuit has declared MPPAA’s retroactive withdrawal liability provisions unconstitutional under the Due Process Clause on the grounds that they modify existing obligations of the parties under their collective bargaining and trust agreements. The Court is thereby invited to ignore its own well settled view that legislation readjusting economic rights and burdens is not unconstitutional merely because it upsets established expectations and imposes a new duty or liability on past acts. The essential test must involve an assessment of whether the Congress acted in an arbitrary and irrational fashion.

Far from acting arbitrarily, Congress was scrupulous in fashioning a liability which withstands the “rational basis” test. ERISA was adopted for the purpose of fostering the financial soundness of private pension plans. Yet, within a few years of the law’s enactment, it became clear that this policy was in jeopardy insofar as it applied to multiemployer plans. The financial crisis facing these plans was carefully analyzed by the PBGC two years before MPPAA was finally adopted; these deep-rooted problems were attested to by numerous concerned witnesses representing the Administration, employers and unions during hearings before four Congressional Committees.

The facts were well-established that the vast majority of employers could withdraw from a multiemployer plan with no further responsibility for funding the benefit obligations they had left behind. The pensions promised to plan participants who had worked for a withdrawn employer must still be honored, but it was the remaining employers who were forced to continue contributing and complete the funding of those benefits. Moreover, once a plan got into financial difficulty, the 1974 law encouraged those remaining employers to "rush for the door" in the hope of escaping liability that would be triggered by the plan's future termination. Thus, in view of the problems disclosed by an extensive legislative record, Congress found it essential to eliminate the incentives for employers to withdraw from multiemployer plans and abdicate to others the burden of funding the plans' promised benefits.

There can be no doubt that the retroactivity provisions of the statute are constitutional, especially when they are evaluated in the context of the factors pertinent to meeting a due process challenge. In considering the reliance interests and equities with respect to the affected parties, it cannot be said that employers who withdrew before enactment were taken by surprise; the legislative debate was open and vigorous and the bill had contained a retroactive feature from the first day of its introduction. Moreover, it was not only withdrawn employers who had an interest in the law. Multiemployer plans, their participants and beneficiaries, and employers who continued to contribute, all had a heavy stake in preserving the financial integrity of their plans.

Nor is this an area which was regulated for the first time with the development and enactment of MPPAA. The original 1974 law was clearly intended to be experimental as it affected multiemployer plan terminations. And, the fact is that pension plans had been the subject

of changing federal regulation for more than three decades prior to the enactment of MPPAA in 1980.

At least as significant are the numerous moderating features of the statute designed to assure that liability was imposed only to the extent necessary to achieve MPPAA's legislative purpose. Congress was scrupulous to take into account those situations where withdrawal liability could be justifiably mitigated in whole or in part. Numerous such moderating provisions were adopted throughout MPPAA's legislative scheme and made applicable to both pre- and post-enactment withdrawals. Moreover, the retroactive application date was itself reduced because of Congress' view that the original effective date extended too far in the past and could be limited to a narrower time frame while still serving its intended goal.

This Court has acted numerous times to reaffirm the constitutionality of retroactive legislation when it found that Congress, as here, acted rationally and with due care. Accordingly, the decision of the Ninth Circuit should be reversed.

ARGUMENT

THE WITHDRAWAL LIABILITY PROVISIONS OF MPPAA APPLIED RETROACTIVELY ARE ESSENTIAL TO THE STABILITY OF MULTIEMPLOYER PLANS AND THE VIABILITY OF THE FEDERAL BENEFIT GUARANTY PROGRAM, AND THEIR ADOPTION AS PART OF A COMPREHENSIVE MEASURE TO FOSTER THOSE OBJECTIVES WAS NEITHER ARBITRARY NOR IRRATIONAL.

The Ninth Circuit has declared unconstitutional MPPAA's retroactive withdrawal liability provisions under the Due Process clause on the grounds that such provisions modify existing obligations of the parties pursuant to their collective bargaining and trust agreements. But, it is now well-settled that legislation readjusting

economic rights and burdens is not unconstitutional simply because it upsets established expectations. This is true even though the effect of the legislation is to impose a new duty or liability on past acts. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) and cases cited therein. Indeed, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. Thus, the issue for the Court is to assess the rationality of the retroactive effects as a means of achieving the Congressional purpose.

In *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), the court concluded that such an assessment can be made "by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem." 592 F.2d at 960. The court also synthesized the pertinent factors to an evaluation of that burden, factors which were largely derived from prior decisions of this Court. Accordingly, in deciding questions of unconstitutionality, the Court has carefully considered four principal elements: the reliance interest of the parties affected, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-247 (1978); whether the impairment of the private interest is affected in an area previously regulated by statute, *Veix v. Sixth Ward Bldg. & Loan Asso. of Newark*, 310 U.S. 32 (1940), *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); the equities of imposing the liability, *Turner Elkhorn*, 428 U.S. at 19; and the extent to which statutory provisions have been included which limit or moderate the impact of the burden, *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934), *Allied Structural Steel*, 438 U.S. at 250.

Examination of "the problem to be remedied" demonstrates beyond doubt that withdrawal liability, as applied retroactively, is an essential part of that remedy. Far from acting arbitrarily, Congress was scrupulous in

fashioning a liability which withstands the "rational basis" test.

A. The Stability of Multiemployer Plans and the Viability of the Federal Benefit Guaranty Program Was Threatened By the Incentives for Withdrawal and Plan Termination Created by ERISA's Original Title IV Provisions.

1. *The Vulnerability of Multiemployer Plans and the Federal Guaranty Program.*

ERISA's enactment in 1974 established a national public policy to foster the financial soundness of private pension plans and to safeguard the benefits earned by participants in such plans. *See*, 29 U.S.C. § 1001. Within a few years of ERISA's adoption, however, it had become clear that this policy was in serious jeopardy insofar as multiemployer plans and their eight million participants were concerned.

The financial crisis facing multiemployer plans was analyzed in a comprehensive report submitted to Congress by the PBGC in 1978 (the "PBGC Multiemployer Study")² and by numerous witnesses appearing during Congressional hearings. Moreover, the provisions eventually enacted were the subject of extensive deliberations by four separate Congressional committees, committee reports and floor debates. The extensive legislative record left no doubt that the economic stability of multiemployer plans was in danger and that the benefit guaranty pro-

² The PBGC Multiemployer Study was submitted on July 1, 1978, pursuant to Congress' direction the previous year that the agency prepare a report concerning the anticipated condition of the multiemployer program. Pub. L. No. 95-214, 91 Stat. 1501 (1977). Following submission of that Study, the Administration, on May 3, 1979, sent to Congress its legislative proposals for restructuring the multiemployer program. Those proposals served as the basis for Congressional hearings and floor debates during 1979 and 1980.

gram for multiemployer plans was headed for financial disaster.³

A basic element of the problem was the fact that the vast majority of employers could withdraw from a multi-employer plan with no further responsibility for funding the benefit obligations left behind, unless the plan terminated within five years of such withdrawal. The pensions promised to those participants who had worked for a withdrawn employer must be still honored, but it is the remaining employers who continue to contribute and complete the funding of those benefits.

Where employer withdrawals thrust sharply increased funding requirements on the remaining contributors, the effect would have been to drive out still more employers and discourage the entry of new contributors whose participation might otherwise have helped relieve the plan's funding burdens. As discussed below, the PBGC Multi-employer Study reported that this process of employer withdrawal and escalating funding costs to the remaining employers had already imperiled a number of multi-employer plans, and the threat to others was becoming increasingly apparent.

Accordingly, in presenting the Administration's legislative proposals to Congress, the Secretary of Labor, who is the Chairman of PBGC's Board of Directors, identified employer withdrawals and the resulting increased burden on remaining employers as the "key prob-

³ While the guaranty program was made immediately effective for single employer plans in 1974, the effective date for multi-employer plans was delayed until January 1, 1978, due to Congress' acknowledged uncertainty regarding the viability of this program for such plans. The 1978 effective date for the mandatory guaranty program was postponed on several successive occasions in order to provide time for the preparation and Congressional consideration of the PBGC Multiemployer Study and subsequent legislative proposals. See, *Peick v. Pension Benefit Guaranty Corporation* ("Peick"), 530 F. Supp. 1025, 1080-83 (N.D. Ill. 1982).

lem" of multiemployer plans.⁴ Congress obviously agreed, expressly finding that:

[w]ithdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries ... [29 U.S.C. § 1001a (a) (4) (A)]

The PBGC Multiemployer Study also warned that the existing employer liability provisions of Title IV were fundamentally flawed insofar as they applied to multiemployer plans. Not only would these provisions fail to support the viability of the guaranty program, but they could seriously undermine it by encouraging the problem of employer withdrawals and the termination of plans which might otherwise continue in operation.⁵

Under the original Title IV provisions a withdrawing employer would be absolved of any liability even if the plan should later terminate—so long as the employer withdrew at least five years before termination. On the other hand, employers who continued to participate in a plan that ultimately terminated would be subject to liability to the PBGC.⁶ Thus, once a plan got into finan-

⁴ *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate, 96th Cong., 1st Sess. 123 (1979)*. These hearings are hereafter cited as "Senate Labor Committee Hearings."

⁵ PBGC Multiemployer Study pp. 23-24; see also H.R. Rep. No. 889, Part I, 96th Cong., 2d Sess. 54-55 (1980).

⁶ As enacted in 1974, ERISA provided that if a multiemployer plan terminated with insufficient assets to provide benefits at the level guaranteed by the PBGC, the insufficiency would be assessed against employers who had contributed during the five years preceding termination. The insufficiency was to be allocated among those employers on the basis of each employer's proportionate share of the total contributions required under the plan during the five-year period. Thus, the earlier within that five-year period that any employer withdrew, the less would be its proportionate share of

cial difficulty, the 1974 law would prompt contributing employers to "rush for the door" in the hope of escaping liability that would be triggered by the plan's potential future termination. The result, of course, would only be to hasten that plan's termination.⁷ Moreover, employers who continued funding the plan would be punished while those who failed to continue to fund promised benefits were simply let off the hook.

The PBGC Multiemployer Study also pointed to another unfortunate incentive provided by the original employer liability rules. Since, upon plan termination, the liability of even those employers who remained in the plan could not exceed 30 percent of their net worth, there would be many occasions in which employers would find plan termination to be less expensive than the continuing obligation to make contributions. The fact that many multiemployer plans are established in service-oriented industries where employers can often operate with relatively low net worth, made this a very real prospect. Moreover, while active employees and their unions would normally be expected to resist employer pressure to terminate a plan, the knowledge that the PBGC would guarantee substantially all of the benefits earned by retirees could neutralize that resistance—particularly if the result were to free up contribution payments which could then be used to fund higher benefits for current workers.⁸

total contributions, and therefore, its liability to the PBGC. The Act further provided that an employer's liability would in no event be greater than 30 percent of its net worth. *See*, 29 U.S.C. §§ 1362-1364.

⁷ *See* H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 15 (1980); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S. 1076).

⁸ *See* PBGC Multiemployer Study, pp. 22-23; Statement of National Coordinating Committee for Multiemployer Plans; Senate Labor Committee Hearings, at 190; 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson).

According to the PBGC's Multiemployer Study, a number of plans were already in serious financial difficulty due to the fact that withdrawing employers had left behind large liabilities which remaining contributors could ill afford to fund. Many of these plans were in industries where such factors as technological advances, foreign competition and changes in consumption patterns had resulted in protracted declines in the number of contributing employers.⁹ Were the benefit guaranty program to go into full effect as originally structured, it was clear that significant numbers of those plans would terminate, with the potential of shifting large, uncontrolled costs onto the insurance program. Such costs would have to be borne by other multiemployer plans through the payment of drastically increased premiums; those increased premiums would add financial burdens which in turn would make it more difficult for other plans to continue operations.¹⁰

⁹ In addition to the analysis provided by the PBGC Multiemployer Study, the difficulties faced by plans in declining industries was discussed at length in the Congressional reports and debates. *See, e.g.,* H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 63 (1980); 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S. 1076).

¹⁰ The PBGC Multiemployer Study concluded that multiemployer plans covering 1.3 million workers (15 percent of all multiemployer plan participants) were experiencing financial difficulties that could lead to plan termination before 1988. The cost to the guaranty program system of such terminations was estimated to be \$4.8 billion. Taking into account only those plans whose insolvency during that period was definitely projected, it was estimated that the guaranty program system would incur costs of approximately \$560 million. PBGC Multiemployer Study, pp. 2, 15-16, 139-40. As the *Peick* court noted, these projections were based solely on economic data and statistical analyses and did not take into account the additional incentives to terminate that ERISA's original employer liability provisions might provide." 539 F. Supp. at 1031. The Congress also concluded that it was necessary to ensure that presently

In view of the problems disclosed by an extensive legislative record, Congress understandably found it essential to eliminate the incentives for employers to withdraw from multiemployer plans and leave others with the burden of funding the benefit obligations they left behind. To accomplish this and other objectives critical to the health and preservation of multiemployer plans it was clear that a substantial revision of existing law was required.

2. Confirmation of the Threat to Multiemployer Plans and the Federal Guaranty Program by Representatives of Employers, Labor Unions and Covered Plans.

Congress was not simply responding to "speculative" predictions of the PBGC Multiemployer Study. The likelihood of multiemployer plan terminations is amply demonstrated by MPPAA's legislative history.¹¹ Throughout the Congressional hearings and subsequent legislative process it was clear that representatives of affected employers, labor unions and multiemployer plans were widely agreed on the danger to multiemployer plans and the Federal guaranty program, absent a major restruc-

healthy plans would continue to accumulate sufficient assets to pay their benefit commitments. *Id.* at 1046, n. 41.

¹¹ It is true that there were relatively few multiemployer plans that had as yet terminated when Congress acted on this legislation. However, the fact is that multiemployer pension plans saw their greatest expansion during the 1950's and 1960's; it was some years before certain industries in which these plans had initially flourished began to decline and before the number of retirees reached levels that became burdensome for the plans in such industries. Prior to ERISA, moreover, financially troubled multiemployer plans were able to cope with their difficulties by such means as deferral of funding, reduction of previously-earned benefits, and the adoption of more stringent vesting and eligibility rules. Once ERISA foreclosed these options, the financial plight of such plans became more apparent. See PBGC Multiemployer Study, p. 4; and H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 54 (1980).

turing of the current law.¹² A number of these groups, including the NCCMP, participated in the hearings held by four Congressional committees, and went on record concerning the need for legislative action.

The urgent need for Congressional action was demonstrated by the extensive analysis presented by the NCCMP,¹³ which substantiated the PBGC's conclusions. Equally significant, these legislative imperatives were attested to by the ERISA Industry Committee, an association of some 100 major corporations sponsoring both single employer and multiemployer plans:

We believe such legislation is essential. Under present law the [PBGC] multiemployer fund faces the prospect of several billion dollars of deficiency within the early years of automatic coverage. The unintended consequence of present law would surely go against every principle already identified; it would accept, and indeed encourage and reward termination of multiemployer plans, it would drive up premiums enormously, and thereby force more plan terminations, and shrink the premium base; and that, in turn, would inevitably require some form of passing the unmet costs of multiemployer plan insurance to others outside the multiemployer plan universe¹⁴

¹² There were repeated references throughout the legislative process to what Congressman Thompson described as "the support of a broad coalition of labor and management groups representing workers and employers in the industries in which multiemployer plans predominate." 126 Cong. Rec. H3947 (daily ed., May 21, 1980). See also H.R. Rep. 869, Part I, 96th Cong., 2d Sess., 63; and Remarks of Senator Williams, 126 Cong. Rec. S10098 (daily ed., July 29, 1980). Senator Javits, another sponsor of the legislation, cited a list of organizations which were supportive of the provisions Congress was about to adopt. 126 Cong. Rec. S10100 (daily ed., July 29, 1980).

¹³ Senate Labor Committee Hearings, pp. 164-227.

¹⁴ *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of*

Such testimony from employers and unions most affected by both then-current law and proposed changes compellingly confirmed for Congress the conclusion that legislative change was critical.¹⁵ This is particularly true since support for proposed changes included employer representatives who do not normally welcome legislation imposing new burdens and who, in other legislative contexts, are frequently in opposition to the labor supporters of this measure.

B. No Practical Alternatives Existed to the Adoption of Withdrawal Liability as Part of Congress' Comprehensive Effort to Overcome the Problems Facing Multiemployer Plans and the Federal Guaranty Program.

The legislation fashioned through three years of study by the PBGC and intensive consideration by Congress represents a painstaking effort to treat, in a comprehensive and balanced fashion, the various factors which

Representatives, 96th Cong., 2d Sess. 104 (1980). For testimony of other witnesses from industries in which multiemployer plans are prevalent, *see, e.g.*, Senate Labor Committee Hearings at 462 (United Mineworkers of America), at 506 (United Food and Commercial Workers), at 594 (Bituminous Coal Operators Association). *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980), at 89 (Master Contracting Stevedore Association of the Pacific Coast), at 93 (Food Marketing Institute), at 132 (National Construction Employers Council). Each of these employer and labor organizations advocated legislative change and supported the general approach of the PBGC proposals.

¹⁵ This is not to suggest that each witness supported all of the Administration's proposals. When Congressional committee hearings were held on those proposals a number of witnesses, while supporting their basic thrust, nonetheless urged various modifications to eliminate potential inequities or to make them more workable. Consideration of such modifications engaged much of the subsequent legislative process, resulting in a final product which had the endorsement of the organizations listed by Senator Javita, n. 13 at 13, *supra*. *See, Peick*, 539 F. Supp. at 1052, n. 62.

threatened the stability of multiemployer plans and the viability of the federal guaranty program.¹⁶ Those provisions, described in detail in the District Court's opinion in *Peick, supra*, demonstrate the statutory purpose to promote continuation, rather than termination, of multiemployer plans by providing for their improved funding, and for the elimination of incentives that encourage employer withdrawal and foster plan decline.

In the process, Congress "spread the pain around", as the *Peick* court so aptly concluded. 539 F. Supp. at 1052. Employers who continue to contribute when others withdraw from a plan are relieved of some of the burden of funding the debt of withdrawn employers, a burden with which they had been saddled in the past. While MPPAA shifted a significant part of that burden to withdrawn employers, a portion of the "pain" was also allocated to employee participants who now face lower guarantees and the possibility of benefit reductions if their plans are in trouble. And the entire universe of multiemployer plans will pay, through higher premiums, to support the PBGC's financial guaranty program, designed to enable insolvent plans to continue operating.

The concept of withdrawal liability is an integral feature of this comprehensive measure. Its adoption was inevitable considering the problems Congress was endeavoring to resolve. Withdrawal liability is the only remedy which can both reduce an employer's incentive to withdraw from a multiemployer plan and make the plan whole when withdrawal nonetheless occurs. It removes from remaining employers the inequitable burden of having to fund the obligations left behind by others,

¹⁶ This Court, noting the Congressional finding respecting the adverse effects of employer withdrawals, has described MPPAA as an effort "to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans"—thereby implementing "express congressional policy favoring multiemployer trusts." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 338, n. 22 (1981).

and thereby relieves concerns of such employers about staying with a plan from which others have departed. It is the one remedy which most effectively protects a plan from the economic consequences of a declining contribution base, and most effectively inhibits those processes which can lead to a plan becoming a burden on the PBGC insurance system.

Most remarkable about the lengthy legislative process that led to MPPAA's adoption is that no alternative—other than scrapping the benefit guaranty program for multiemployer plans entirely—was ever seriously suggested. It is this lack of any realistic alternative that explains the support not only of the Administration, but also of both employer and labor groups; they all recognized the critical deficiencies of the existing law and, in the final analysis, concluded that withdrawal liability was an indispensable part of the solution.

C. The Retroactive Application of the Withdrawal Liability Provisions Was Consistent With the Comprehensive Scheme to Protect the Continuing Viability of Multiemployer Plans.

Having become so well-informed regarding the potential impact on multiemployer plan stability of a "rush for the door" psychology on the part of contributing employers, Congress would have been foolish to adopt an arrangement that did not deter employer withdrawals during the lengthy legislative consideration of MPPAA. To have acted otherwise would have been to foster the very result which MPPAA was designed to prevent. Moreover, as we show below, the statute is fully consistent with the due process tests which have been fashioned by this Court.

1. *The Reliance Interest of the Parties.*

It cannot be said that employers who withdrew from plans prior to MPPAA's enactment date were taken by surprise that they would be subject to retroactive liability. As noted by the *Peick* court,

[w]hen the bill was originally introduced on May 3, 1979, the withdrawal liability rules were effective as of February 27, 1979, the date the PBGC transmitted its initial legislative proposal to Congress. See 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga). The February 27, 1979 date remained a part of the bill until June 1980, when the Senate Finance Committee determined that it was an unnecessarily harsh starting point. The Committee shortened the retrospective period by more than a year, advancing the effective date to April 29, 1980, where it now stands.

539 F. Supp. at 1053.

It was no secret to affected employers that the Congress was moving deliberately to enact these legislative changes in federal pension law. As discussed above (at 13-14), the groups representing employers, labor unions and pension plans were deeply involved in MPPAA's development throughout the legislative process. And it was no secret that three of the four Congressional committees which had approved the bill did so with its original February 27, 1979 effective date left intact. *Id.*¹⁷

Nor are withdrawn employers the sole parties whose reliance interests must be considered here. Plan participants have clear expectations that when they give of their labor to employers contributing to multiemployer plans they will ultimately be entitled to a pension upon retirement. Participant reliance upon retirement income security has been especially heightened since the enactment of ERISA almost a decade ago. Moreover, the employer is not merely obligated to honor its commitments

¹⁷ Indeed, Senator Matsunaga, a member of the Senate Finance Committee which changed the retroactive effective date to April 19, 1980, expressed the view of many legislators that employers had "ample notice" of MPPAA's retroactivity provisions more than a year before the actual date of enactment. (126 Cong. Rec. S10158 (daily ed., July 29, 1980)).

to the collective bargaining agent of its employees; the employer's obligation is also to the multiemployer plan and its trustees, participants and beneficiaries.¹⁸ Thus, the plan and its trustees have a strong reliance interest which must be considered here. So, too, do employers who continue to maintain the plans have a reliance interest.

Accordingly, all of the parties who continue to have interests in preserving the plan must be able to rely on their expectations that the plan will remain financially sound. Congress may act to ensure that the expectations of the greater whole will be protected, even if the consequences may be to modify some of the bargained expectations of the withdrawing employers whose acts have jeopardized the interests of others.

2. Prior Regulation of the Employers' Obligations to Pension Plans.

Neither the Court of Appeals below, nor any withdrawn employer who has challenged MPPAA's retroactivity provisions, has suggested that the withdrawal of a contributing employer from a multiemployer plan was not previously regulated under ERISA. The fact is that such employers were subject to liability under former

¹⁸ Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5), requires that there be a "written agreement with the employer" which specifies the detailed basis upon which payments to a fund are to be made. Thus, plans may enter into direct relationships with an employer even in the absence of a bargaining agreement. In addition, the plan has enforceable rights directly against the employer. These rights were expressly ratified by Congress when, as part of MPPAA, Congress enacted Section 515 of ERISA, 29 U.S.C. § 1145, making employers directly liable to multiemployer plans for the payment of contributions which they are obligated to pay. And, concomitant with the addition of ERISA § 515, Congress strengthened the provisions of ERISA § 502, 29 U.S.C. § 1132, with respect to a multiemployer plan's right to enforce contribution obligations against delinquent employers. *See*, 29 U.S.C. § 1132(g)(2).

ERISA § 4064(b), 29 U.S.C. § 1364(b) (Add. 53.), in the event the plan terminated within five years of withdrawal. *See also*, former ERISA § 4063, 29 U.S.C. § 1363 (requiring "substantial employers" who withdraw from a multiemployer plan to post a bond or pay into escrow the amount of 150 percent of the liability which they would owe to the plan and which amount would be forfeited in the event the plan terminated within 5 years).

The Administration recommended MPPAA and the Congress enacted it for the simple reason that the prior regulatory scheme was not working as it had been designed to. To correct the deficiencies in the earlier law Congress merely strengthened the regulatory framework which it found was not having the desired effect.

Nor, as we have shown, can it be said that employers had reason to expect that this was an area of regulation which was static. MPPAA, including its retroactive effect, had been under consideration and debate in the public press as well as the Congress for almost two years before its final enactment.¹⁹ Moreover, pension plans had been the subject of changing Federal regulation for more than three decades prior to MPPAA. The *Peick* court put it best:

¹⁹ It was clear to everyone that the original Title IV program was intended to be experimental. The Senate Committees on Human Resources and Finance put it thus in their Report on S.2125 which was enacted (as P.L. 95-214) to delay the implementation of the original multiemployer plan termination program:

The period of discretionary coverage was created when ERISA was enacted in 1974 due to existing uncertainties regarding the incidence of multiemployer plan terminations and the impact of title IV's provisions on such plans. In essence, the Congress provided a trial period during which insurance benefits could be made available in the discretion of PBGC and during which PBGC, the multiemployer plan community and the Congress could, through observation of experience in the discretionary period, assess the suitability of title IV's provisions as they relate to multiemployer plans.

[M]ultiemployer plans have been subject to decades of pre-MPPAA federal regulation under Section 165 (now section 401) of the Internal Revenue Code, section 302 of the Labor-Management Relations Act of 1947, and the Welfare and Pension Plans Disclosure Act of 1958. Moreover, and most significant, the 1974 enactment of ERISA demonstrated in the clearest possible way that contractual limitations on withdrawal liability were themselves susceptible to federal displacement. By its terms, ERISA voided all absolute exemptions, and installed in their place a regime of contingent liability. This development alone afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created. Nachman never received such explicit warning. . . .

539 F. Supp. 1044-45 (fn. omitted).

3. The Equities Mandate a Finding of Constitutionality.

The Congressional Findings and Declaration of Policy of MPPAA, 29 U.S.C. § 1001a (supp. 1981) make clear the underlying objectives of the law to remedy the adverse effects which employer withdrawals have upon multiemployer plans and their participants and beneficiaries. *See*, p. 9, *supra*. Further, when the bill was reported to the full Senate by the Senate Finance Committee, Senator Bentsen, then chairman of the Subcommittee on Private Pension Plans, said:

The feeling of the Senate Finance Committee was that this bill should not encourage employers to withdraw from a multiemployer plan between now and July 1, 1980. Any withdrawals after April 28, 1980, will be covered by any withdrawal liability rules that the committee might adopt.

126 Cong. Rec. S4302-03 (daily ed.), April 29, 1980.

Certainly, this is clear evidence that the overriding equities were intended to favor the plans, their par-

ticipants and the employers who remained as contributors to plans and who were otherwise faced with the burden of assuming the obligations left behind by withdrawn employers.

Contrary to the view of the Ninth Circuit, imposing retroactive liability is not a basic change in the contractual relationship between the withdrawn employer and its employees. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), this Court found a Minnesota law unconstitutional, which immediately upon enactment reduced the number of years of service necessary for an employee to be vested in a pension. Such an action may well have been "a severe, permanent, and immediate change" in ongoing contractual relationships under the facts of that case. *Id.* at 250. Moreover, the change was the result of the legislative process; no employer action or inaction effected the change. But here, there is no change in the contractual basis for requiring contributions until an employer takes the affirmative act of withdrawing, thereby repudiating its own contractual obligations. It was as a matter of equity for the other affected parties that Congress determined withdrawn employers must assume part of the liabilities which, absent withdrawal, would fall upon the plan, its participants and the remaining contributing employers.

4. *Certain Provisions of MPPAA Were Designed to Moderate the Impact of Withdrawal Liability, Including the Impact of its Retroactive Application.*

Congress determined that certain provisions of MPPAA, like the limited retroactive application of withdrawal liability, were essential to multiemployer plan stability. However, it also made every reasonable effort to moderate the impact of the rules. In so doing Congress demonstrated its intent to impose liability "only to the extent necessary to achieve the legislative purpose," thus confirming the rationality of its legislative efforts. *Nachman, supra*, 592 F.2d at 962.

In assessing the impact that any given withdrawal will have on a multiemployer plan an important consideration is whether the plan loses a portion of its contribution base as a consequence. A cessation of an employer's participation that does not involve an erosion of that base—because, e.g., another employer has effectively stepped into the withdrawing employer's shoes—is not likely to have a destabilizing effect.

Although there are enormous practical difficulties in crafting statutory rules to distinguish between the effects of various withdrawals, Congress undertook to make this distinction to the extent possible.²⁰ One result of that effort was the "sale of assets" rule found in 29 U.S.C. § 1384. Under that provision—which has both prospective and retroactive application—a withdrawal is deemed not to have occurred when an employer ceases to contribute as a result of the sale of its business assets to another party, provided that the purchaser assumes the obligation to contribute to the plan for substantially an equivalent number of employees and meets certain other protective conditions.

Congress also concluded that in some industries the nature of employment is such that an employer's cessation of contributions is unlikely to reduce a plan's contribution base. It felt sufficiently confident about two such industries—construction and entertainment—to pro-

²⁰ The difficulties of formulating statutory provisions that generally distinguish between withdrawals that are harmful to a plan and those that are not are exemplified by 29 U.S.C. § 1383(d). That provision was designed to provide contributors to trucking industry plans an exclusion for withdrawals if "the plan's contribution base does not suffer substantial damage". See 126 Cong. Rec. S11671-72 (daily ed., August 26, 1980) (Remarks of Senator Durenberger). Despite the efforts of the legislators to develop a generally applicable statutory test, they could find no alternative but to make the exclusion of any individual withdrawal dependent upon the PBGC, within five years, determining that the plan had not suffered such damage.

vide special statutory rules. In those two industries, Congress found that contributing employers customarily operate on a project-by-project basis; since employees are generally tied to the industry rather than to a particular employer, an employer's cessation of contributions ordinarily does not adversely affect the plan's contribution base. Accordingly, in those two industries the only event defined as a "withdrawal" is the one that Congress concluded is likely to remove a portion of a plan's contribution base—an employer's cessation of contributions accompanied by its continuation or resumption, within the applicable jurisdiction, of the type of work covered by the plan. 29 U.S.C. §§ 1383(b) and (c). Here, too, the rules have retroactive effect.

One of the most significant moderating provisions applicable to both pre- and post-enactment withdrawals—particularly for smaller employers and those whose contacts with a plan have been limited—is the "*de minimis*" exemption. This provision exempts all withdrawal liability amounts under \$50,000, and a portion of any amounts between \$50,000 and \$150,000, thus affecting many withdrawal liability assessments. See, *Peick, supra*, 539 F. Supp. at 1050. In addition, each plan has the option to adopt a higher *de minimis* rule—exempting amounts under \$100,000 and reducing amounts between \$100,000 and \$250,000. 29 U.S.C. § 1389.

Another important feature applicable to all withdrawals—clearly an improvement on ERISA's original liability rules from the standpoint of the employer—is that MPPAA does not require liability to be paid in a lump sum.²¹ The basic rule is that the total amount is

²¹ The original Title IV rule on employer liability—which still applies to single employer plans—requires its payment in a lump sum. While the PBGC has discretionary authority to grant reasonable terms, its implementing regulation states that it will do so only when necessary to avoid the imposition of a severe hardship, and then only when it appears the employer is able to satisfy those terms and pay the entire liability. 29 C.F.R. 2662.8.

to be amortized and paid in installments based on the employer's historic levels of plan contributions. 29 U.S.C. § 1399(c). If more than 20 years are required to amortize such liability on this basis, the payments for the remaining liability are forgiven. In addition to the statutory provisions for amortization of the liability, plan trustees may further adjust the terms of payment pursuant to their broad discretion to "adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability." 29 U.S.C. § 1404.

Other significant moderating features added by MPPAA include: a special net worth limitation on the liability of an employer which sells substantially all of its assets, 29 U.S.C. § 1405(a); the exemption of certain property of a sole proprietor or partner from the collection of liability, 29 U.S.C. § 1405(c); and two changes that help preserve an employer's ability to obtain credit. One such change gives the plan only the status of a general creditor with respect to withdrawal liability, as contrasted to the tax lien priority the PBGC enjoyed under prior law for termination liability; the other gives the plan general creditor status only as to 50 percent of the withdrawal liability of an insolvent employer undergoing liquidation, 29 U.S.C. § 1405(b).

There are two provisions of MPPAA which specifically were enacted to mitigate the effect of the law's retroactive provisions. One of these provisions states that, in the case of an employer which closed a facility or terminated a collective bargaining agreement under which it was making contributions to a plan prior to the effective date of the statute, contributions and contribution base units attributable to such facility or agreement will be disregarded in the calculation of the employer's withdrawal liability. 29 U.S.C. § 1397. The second provision allows a plan to be amended to permit a reduction or waiver of liability for a withdrawn employer "which resumes covered operations under the plan or renews an

obligation to contribute under the plan." 29 U.S.C. § 1387(b).

Finally in this regard, it is important to recall that Congress moved forward the retroactive application date from February 27, 1979 to April 29, 1980. This action alone had a significant moderating effect since it narrowed the application of withdrawal liability to a smaller group of employers than would have been affected by the bills as originally proposed. It is thus clear that Congress took only the steps it concluded were necessary to accomplish its goals.

D. It Is Well Settled that Retroactive Legislation Can Withstand Constitutional Challenge.

There is no dispute that statutes having retroactive application can survive a constitutional challenge when it is shown that Congress did not act arbitrarily or irrationally. *Turner Elkhorn* fully supports that proposition and we have demonstrated that MPPAA has fully satisfied the tests which permit this Court to reaffirm its constitutionality. So, too, this Court has upheld laws with retroactive effective dates. See, e.g., *United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam) (minimum tax provisions of Internal Revenue Code amendments applied retroactively); *United States v. Hudson*, 299 U.S. 499 (1937) (federal tax on silver trading applied retroactively); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (state statute to protect homeowners against foreclosure of already executed mortgages does not violate due process).²² MPPAA's

²² An argument may be made to the Court that it is only in tax cases that the courts have upheld retroactive application of a "new liability." Such an approach suggests that the tax laws are *sui generis* since Congress almost invariably revises the tax laws to include a limited retroactive feature and because this Court always

retroactivity provisions lend themselves to similar analysis and should withstand the scrutiny of the Court.

CONCLUSION

For the foregoing reasons, the NCCMP urges this Court to reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

GERALD M. FEDER *

NIK B. EDES

FEDER & EDES

1527 - 18th Street, N.W.

Washington, D.C. 20036

(202) 387-1515

Attorneys for Amicus Curiae

National Coordinating Committee

for Multiemployer Plans

*(Counsel of Record)

Of Counsel:

ARNOLD & PORTER

1200 New Hampshire Avenue, N.W.

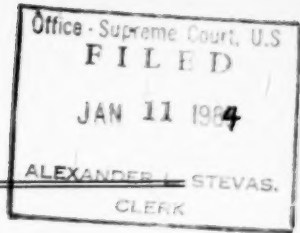
Washington, D.C. 20036

(202) 872-6700

assumes that taxpayers will receive income even though they know that some portion of it will be taxed.

Such apparent distinctions do not withstand scrutiny. Many tax statutes have the effect and purpose of regulating private conduct in economic and social affairs. Thus, in *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct.Cl. 1970), cert. denied, 398 U.S. 950 (1970), the Court of Claims upheld the retroactive application of an interest equalization tax albeit that the court recognized full well it was "primarily regulatory in nature and imposed upon a voluntary taxpayer act. . . ." *Id.* at 730. The MPPAA withdrawal liability provisions are not dissimilar in effect to certain kinds of tax liabilities imposed by Congress and which have a specific regulatory purpose. As such the retroactive applicability of withdrawal liability can withstand the constitutional challenge here.

No. 83-245



**In the
Supreme Court of the United States**

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

R. A. GRAY & COMPANY,
Appellee

**ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Brief of Amicus Curiae
National Steel Service Center, Inc.**

RALPH T. DeSTEFANO*
RICHARD R. RIESE
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7776
****Counsel of Record***

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In the
Supreme Court of the United States

No. 83-245

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

R. A. GRAY & COMPANY,
Appellee

I. INTEREST OF AMICUS CURIAE

Amicus Curiae National Steel Service Center, Inc. writes in support of the position of the Appellee R. A. Gray & Company.¹ Written consent of the parties to Case No. 83-245 has been obtained for this appearance in accordance with United States Supreme Court Rule 36.2 and such written consent has been filed of record with the Clerk.

¹*Amicus Curiae* National Steel Service Center, Inc. is plaintiff/appellee in *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Areas Pension Fund et al.*, No. 82C-5315 (N.D. Ill. E.D. November 23, 1983) (McGarr, C.J.) appeal pending (7th Cir. No. 83-3298), which action seeks declaratory and injunctive relief based on the unconstitutionality of the retroactive effective date provisions of the Multiemployer Pension Plan Amendments Act of 1980 on the following facts of record therein: In November, 1978, National Steel Service Center, Inc. negotiated a multi-year collective bargaining agreement with the local union representing its employees which agreement called for the company to cease contributing to the Central States, Southeast and Southwest Areas Pension Fund effective August 1, 1980 and to begin coverage of its employees under a single employer pension plan with retirement benefits as negotiated with the union on behalf of the employees at its Oak Creek, Wisconsin facility.

II. ARGUMENT

The Retroactive Application of the Withdrawal Liability Provisions of the MPPAA Is An Unconstitutional Denial of Due Process Assured by the Fifth Amendment.

It is important to realize that the MPPAA regulates multiemployer plans of the "Taft-Hartley" variety. The plans are in reality creatures of collective bargaining between a union and several employers. Employee Retirement Income Security Act of 1974 ["ERISA"] 88 Stat. 829 *as amended* by Multiemployer Pension Plan Amendments Act of 1980, ["MPPAA"] 94 Stat. 1209 at 29 U.S.C. §1002(37); *Peick v. PBGC*, No. 82-2081 (7th Cir., December 19, 1983) Slip.Op. at p. 11.

Collective bargaining is, in turn, a statutory creation with forty-nine years of Congressional, administrative, and judicial precedent upon which employers, unions, and employees regularly rely in establishing the relationships and obligations among them. It is precedent which dictates the process to be accorded Appellee R. A. Gray & Company and other similarly situated employers. It is that process which has been unconstitutionally abrogated by making the MPPAA retroactively effective.

Collective bargaining is predicated on a statutory framework which, since its inception, has been recognized as providing a free opportunity to negotiate without compelling the content of the parties' adjustments or agreements. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). The forum of the bargaining table and the economic resources of the parties describe a process which legitimizes and promotes negotiation between employer and employee representatives to create their own ordering

of wages, benefits, terms, and conditions of employment, free from government dictation of a substantive resolution to their differences. *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 490 (1960); *Local 24, Int'l. Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Clearly included within this bargaining process are the retirement benefits and pension rights of active employees. *Allied Chemical & Alkali Workers of Am., Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180-181 (1971).

The conduct of R. A. Gray & Company in bargaining with the union in 1980 was protected by federal labor policy. Gray gave appropriate notice to the union of its desire to terminate its current labor agreement upon its expiration. (J.A. 19) Correspondence over new proposals for a labor contract took place, including discussions of pension matters. No agreement was reached before the existing contract's termination. (J.A. 105, 156, 159, 160) Thereafter, Gray permissibly implemented its proposals "without prejudice to such agreement as future negotiations may produce." However, the Union did not maintain the support of the company's employees and no subsequent agreement was reached. Therefore, Gray's obligation to contribute to the Pension Plan permanently ceased as of June 1, 1980. Although a new bargaining agreement did not result, the process of good faith bargaining was observed and no unfair labor practice asperses this conclusion. Accordingly, this collective bargaining process result deserves due process protection against the *ex post facto* interference occasioned by the retroactively effective provisions of the MPPAA.

"For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*" L. Tribe, AMERICAN CONSTITUTIONAL LAW §9-7, at 490 (1978) (Emphasis in original). Transcending the impairment clause to protect individual reliance interests on government-countenanced procedures is the Due Process clause. See e.g., *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Thorpe v. Housing Authority*, 393 U.S. 268 (1969); *Raley v. Ohio*, 360 U.S. 423 (1959); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942); *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932).

The decades of Congressionally, administratively, and judicially encouraged reliance on the statutorily established freedom of parties engaged in the collective bargaining process to determine the substance of their obligations and liabilities warrants the protection of the Due Process clause against the ancillary assault mounted by the pre-enactment application of the MPPAA. Congress may not renege on its federal labor law word. Actions contemplated, taken, and consummated in accordance with long established and balanced federal rights may not be the basis for triggering extraordinary liabilities due to the retroactive effective date of chronologically subsequent Congressional action.

The MPPAA is primarily directed at the prevention of future pension plan failures and at prospective improvement of plan stability. *Peick v. PBGC*, *supra*, Slip.Op. at p. 36. *R. A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F.Supp. 531, 535-536 (D.Ore. 1982), *rev'd*, 705 F.2d 1502 (9th Cir. 1983), *prob. juris noted sub nom. Pension Benefit Guaranty Corp., v. R. A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 17, 1983) (Nos. 83-245, 83-291). Such purposes are generally insufficient bases for retroactive legislation. *Usery v. Turner Elkhorn Mining*, 428 U.S. 1, 17 (1976). Retroactivity therefore is predicated on deterring "opportunistic" employers from withdrawing in anticipation of legislation.² The pejorative label, "opportunistic", ignores the mutuality of collective bargaining. Employers are not free to unilaterally alter their labor agreement obligations. Nor may an employer negotiating a new agreement act unilaterally without first engaging in good faith bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). The Congressional hypotheses of unprincipled opportunism and massive withdrawals are not plausible in the real world of collective bargaining.

MPPAA retroactivity is not the mere upset of otherwise settled private expectations. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16. For *Turner Elkhorn Mining* is distinguishable and its deferential standard is inapplicable where there is affirmative Federal endorsement of the type

²The element of reasonable anticipation is a minimally necessary, but not sufficient, element of a retroactive enforcement scheme, *Welch v. Henry*, 305 U.S. 134, 147 (1938), particularly where deterrence is intended. *United States v. Peltier*, 422 U.S. 531 (1975). Compare, *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, *supra*.

of private conduct and expectations implicated here. Collective bargaining is a special case. This is not to argue that freedom of collective contract is inviolate. Congress has from time to time passed ancillary laws which impinge on the substantive terms of collective bargaining agreements—but not retroactively. See *e.g.*, ERISA, 29 U.S.C. §1061(c)(1) and §1086(c)(1); see also, *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 382 (1980); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Jewel Ridge Coal Corp. v. Local No. 6167, UMW*, 325 U.S. 161 (1945).

The preenactment enforcement of the MPPAA to assess liability upon bargaining activity otherwise federally protected when it occurred, or upon action taken in accordance with a collective bargaining agreement which has been fully performed, does inexcusable violence to the rights of R. A. Gray & Company and other similarly situated employers. It is this due process within the federally demarcated bounds of the economic forum of labor relations which has been unconstitutionally abrogated by MPPAA retroactive enforcement. Therefore, the Court should declare null and void the retroactively effective provision of the MPPAA and uphold the half century of precedent which supports the American collective bargaining system.

III. CONCLUSION

Based on the argument above and the arguments of Appellee R. A. Gray & Company and the supporting *amici curiae*, the judgment of the Court below must be affirmed.

Respectfully submitted,

RALPH T. DEStEFANO

RICHARD R. RIESE

THORP, REED & ARMSTRONG

One Riverfront Center

Pittsburgh, PA 15222

(412) 394-7776

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Nos. 83-245 and 83-291

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,

Appellant,

v.

R.A. GRAY & CO.,

Appellee.

No. 83-245

**OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,**

Appellant,

v.

R.A. GRAY & CO.,

Appellee.

No. 83-291

**On Appeal From The United States
Court Of Appeals For The Ninth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF REPUBLIC INDUSTRIES, INC.
AS AMICUS CURIAE IN
SUPPORT OF APPELLEE R.A. GRAY & CO.**

Of Counsel

LESTER M. BRIDGEMAN
LOUIS T. URBANCZYK
304 Capital Gallery East
600 Maryland Avenue, SW
Washington, D.C. 20024
(202) 484-5911

PHILIP B. KURLAND *
CHRISTOPHER G. WALSH, JR.
Two First National Plaza
Suite 2500
Chicago, Illinois 60603
(312) 372-2345

* Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,

Appellant,

v.

R.A. GRAY & CO.,

Appellee.

No. 83-245

**OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,**

Appellant,

v.

R.A. GRAY & CO.,

Appellee.

No. 83-291

**On Appeal From The United States
Court Of Appeals For The Ninth Circuit**

**MOTION OF REPUBLIC INDUSTRIES, INC.
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN
SUPPORT OF APPELLEE R.A. GRAY & CO.**

Pursuant to Supreme Court Rule 36.3, Republic Industries, Inc. ("Republic") asks leave to file the attached brief *amicus curiae* in support of R.A. Gray & Co., the Appellee in Nos. 83-245 and 83-291.

Both the Appellee, R.A. Gray & Co., and the Pension Benefit Guaranty Corporation, Appellant in No. 83-245, have consented to the filing of this *amicus* brief in No. 83-245. The Oregon-Washington Carpenters—Employers Pension Trust Fund, Appellant in No. 83-291, has withheld its consent.

Republic has been subjected to withdrawal liability claims exceeding its entire net worth that have been asserted by several multiemployer pension funds under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.* All arise from the pre-enactment termination of the business operations of a former subsidiary of Republic that has been dissolved.

Republic has six pending cases in which it challenges the constitutionality of retroactive application of MPPAA. In one, the Court of Appeals for the Fourth Circuit has upheld the statute. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983). Republic has filed a petition for certiorari asking this Court to review the Fourth Circuit's judgment. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, No. 83-541. The Court has not yet acted on the petition.

Inasmuch as Republic's survival depends on the outcome of these pending appeals, the Court should grant Republic leave to file the attached *amicus* brief.

Respectfully submitted,

Of Counsel

LESTER M. BRIDGEMAN
LOUIS T. URBANCZYK
304 Capital Gallery East
600 Maryland Avenue, SW
Washington, DC 20024
(202) 484-5911

PHILIP B. KURLAND*
CHRISTOPHER G. WALSH, JR.
Two First National Plaza
Suite 1500
Chicago, IL 60603
(312) 372-2345
*Counsel of Record

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Letter from John L. Sherry, Director, Financial Group, Central States, Southeast and Southwest Areas Pension Fund, to Sam Amatangelo, Arthur Young and Company (Aug. 24, 1981), Exhibit A, Plaintiffs' Memorandum in Opposition to Pension Fund Memorandum in Support of Cross-Motion, and in Opposition to Motion, for Summary Judgment, <i>Johnson Motor Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund</i> , No. 81 C 3703 (N.D. Ill. filed July 1, 1981)	5, 26
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,

Appellant,

v.

R.A. GRAY & CO.,

Appellee.

No. 83-245

**OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,**

Appellant,

v.

R.A. GRAY & CO.,

Appellee.

No. 83-291

**On Appeal From The United States
Court Of Appeals For The Ninth Circuit**

**BRIEF OF REPUBLIC INDUSTRIES, INC.
AS AMICUS CURIAE IN
SUPPORT OF APPELLEE R.A. GRAY & CO.**

INTERESTS OF THE AMICUS

As successor in interest to Johnson Motor Lines, Inc. ("Johnson"), *amicus curiae* Republic Industries, Inc. ("Republic") has been subjected to "withdrawal liability" claims exceeding its entire net worth that have been asserted by several multiemployer pension funds under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, which became law on September 26, 1980. All of the claims are based on the pre-enactment termination of Johnson's business operations on August 8, 1980. Prior thereto, Johnson had been an interstate motor carrier of freight and, pursuant to collective bargaining agreements with several Teamsters locals, had made periodic contributions to various multi-employer pension funds. The agreements required that defined contributions be made in exchange for specified units of work. When the work stopped, Johnson's contractual duty to contribute ceased.

In the aggregate, the principal amount of the claims asserted is \$19,744,000, which is substantially more than Republic's entire net worth and more than Johnson's cumulative net earnings over the 35 years of its existence. If paid on the installment schedules established pursuant to 29 U.S.C. § 1399(c), the amounts claimed, with interest tacked on for failure to pay the liability immediately in a lump sum, exceed \$25,537,000.

At the time Johnson's directors decided to close its business because of severe operating losses, neither they nor the attorneys and accountants who advised them knew that this would constitute what Congress later defined as a "withdrawal". 29 U.S.C. §§ 1382(a), 1461(e)(2)(A). Had they

known then what they know now about the "withdrawal liability" provisions of MPPAA, Johnson's directors would have pursued other alternatives, even at a substantial loss, rather than permit the confiscation of the entire net worth of both Johnson and Republic, which controlled Johnson for only 14 months prior to the liquidation of its business.

Republic has filed six cases challenging the constitutionality of retroactive application of MPPAA. In one of the two cases that have been decided, the District Court has declared the statute unconstitutional as retroactively applied. *Republic Industries, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, No. 81-2703-S (D. Mass. Aug. 3, 1983), appeal docketed, No. 83-1657 (1st Cir.). In the other, the Court of Appeals for the Fourth Circuit has upheld retroactive application of the statute. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983).

Republic has asked this Court to review the Fourth Circuit's judgment. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, No. 83-541 (U.S.). Republic's petition for certiorari and the affidavit of R.B. Riss set forth at pages 150a-165a of the appendix to the petition, cited herein as "*Republic App.*," describe how Johnson's pre-enactment termination of business came to subject Republic to an unexpected withdrawal liability that substantially exceeds its entire net worth.

STATEMENT

Applying the analytical framework set forth in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979), cert. denied on constitutional grounds, 442 U.S. 940 (1979), aff'd on statutory grounds, 446 U.S. 349 (1980), the Ninth Circuit held that retroactive application of the withdrawal liability provisions of MPPAA violates the Due Process Clause of the Fifth Amendment. *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502 (9th Cir. 1983). In *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), the Fourth Circuit applied the same analytical framework but reached a different result, as did the Seventh Circuit in *Peick v. PBGC*, No. 82-2081 (7th Cir. Dec. 19, 1983). This Court must now resolve the conflict.

Constitutional issues ought not be decided in the "rarified atmosphere of a debating society" but rather "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Unfortunately, the record before this Court offers little guidance as to how the unfunded vested benefits liability allocated as withdrawal liability comes into being,¹ how

¹ The unfunded vested benefit liabilities of the pension funds allocated as withdrawal liability, 29 U.S.C. § 1381(b), are created through no fault of the employers. *Lo Cicero Affidavit* ¶¶ 16.11-14, *Republic App.* at 192a-193a. Indeed, to the extent that 10% of the multiemployer pension funds covered by MPPAA's insurance scheme faced serious financial difficulties, they were in large measure caused by the minimum vesting requirements and the benefit reduction prohibitions created by ERISA. See *PBGC*,

(Footnote continued on following page)

actuaries go about hypothesizing the amount thereof,² and how the claimant funds have applied the so-called "ameliorative" provisions of MPPAA,³ 29 U.S.C. §§ 1384, 1389(a)-(b), 1398(1)-(2), 1399(c)(1)-(2), and the statutory "exemptions,"⁴

¹ *continued*

Multiemployer Study Required by Pub. L. No. 95-214, at ¶4, 15-17, 22-24, 94 (1978) [hereinafter "PBGC Study"]. The minimum vesting requirements established by ERISA dramatically exacerbated the unfunded vested benefit liabilities of multiemployer funds; in many cases, doubling, trebling or quadrupling them. *Lo Cicero Affidavit* ¶¶ 14, 16.11, *Republic App.* at 190a-193a.

² The amount of the liability is based on "actuarial assumptions" that are mere "guesstimates" of the unknown past and the unknowable future which usually "turn out to be wrong." *Lo Cicero Affidavit* ¶¶ 16.21-27, *Republic App.* at 193a-200a. Even seemingly minor changes in actuarial assumptions can alter the size of the unfunded vested benefit liability allocated as withdrawal liability radically. For example, the actuary for the Central States Fund gave its trustees three different estimates of its unfunded vested benefit liability ranging from \$2.047 billion to \$4.108 billion. Each estimate was reported to be based on actuarial assumptions that, though different than those used in the other estimates, were "reasonable in the aggregate," 29 U.S.C. §§ 1393(a)(1)-(2), (b)(2), 1401(a)(3)(B). *Lo Cicero Affidavit* ¶ 16.27, *Republic App.* at 199a.

³ Many lower courts have assumed that the ability to pay withdrawal liability in installments rather than in a lump sum is a significant ameliorating factor. *E.g., Peick v. PBGC*, 539 F.Supp. 1025, 1050 (N.D. Ill.), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983). But the installment-payment option actually increases the amount owed, as the funds require either that the principal amount claimed be paid immediately in a lump sum or that they be compensated for loss of its use through interest charges built into the amortization schedules set pursuant to 29 U.S.C. § 1399(c)(1).

⁴ Whether the exemptions apply is an arbitrable "determination" made by the funds that can be overturned only if "unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). The funds rarely find an exemption applicable. One that first determined the trucking industry exemption of 29 U.S.C. § 1383(d) applied to Republic later retracted its determination after receiving "conflicting interpretations" of the term "employer" in "informal discussions with PBGC's staff." *Republic App.* at 180a-181a, 183a-184a.

id. §§ 1383(b)-(d), and "exclusions," ⁵ *id.* §§ 1397(a)(1)-(2).

Republic has made a record on these matters and invites the Court's attention to its Petition for Certiorari, No. 83-541, and the Appendix thereto. Republic is, of course, only one of many companies whose survival has been jeopardized by MPPAA. Its plight, however, is not atypical of the employers sandbagged by retroactive application of MPPAA.⁶ The affidavits of Republic's chairman, *Republic App.* at 150a-165a, and of its actuarial consultant, *id.* at 185a-200a, and the correspondence exchanged between Republic and one of the many pension funds that have asserted withdrawal liability claims against Republic, *id.* at 166a-184a, 201a-206a, may assist the Court in understanding how this new statute actually is being interpreted and applied by the claimant funds charged with its implementation, 29 U.S.C. §§ 1382, 1399(b)(1), 1401(a)(3)(A)-(B), and in attaining a "realistic ap-

⁵ Whether the exclusions apply also is controlled by the funds' "determination" unless "unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). See *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 634-35 (4th Cir. 1983).

⁶ The Director of Finance for the Central States Fund has reported to the Fund's auditor that over half of the withdrawal liability identified as of August 24, 1981 was owed by companies in bankruptcy, and that the collectibility of the rest was doubtful because the financial condition of "the non-bankrupt companies, in most cases, is similar, in that these companies have also ceased operations due to their inability to operate as viable entities." Letter of John L. Sherry, Director, Financial Group, Central States, Southeast and Southwest Areas Pension Fund, to Sal Amatangelo, Arthur Young and Company, at 3 (August 24, 1981), Exhibit A, Plaintiffs' Memorandum In Opposition to Pension Fund Memorandum In Support of Cross-Motion, and in Opposition to Motion, for Summary Judgment, *Johnson Motor Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 81 C 3703 (N.D. Ill. filed July 1, 1981).

preciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472 (1982).

SUMMARY OF ARGUMENT

The Ninth Circuit's judgment is sound and should be affirmed. As its well-reasoned opinion shows, retroactive application of MPPAA cannot be justified even if the analytical framework of *Nachman Corp. v. IBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional grounds*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 349 (1980), governs the constitutionality of a statute which not only has retrospective effects, but which also is retroactive in application.

But even if the standard of review articulated in *Nachman* is appropriate for statutes having retrospective effects but which are substantially or entirely prospective in application, it is inappropriate for a statute, like MPPAA, which imposes a new and unexpected liability for pre-enactment conduct not triggering liability under the law in effect at the time the citizen acted. Such a statute clearly infringes the procedural due process right to notice and fair warning, a right which is "fundamental to our concept of constitutional liberty," *Marks v. United States*, 430 U.S. 188, 191 (1977), and which is a presupposition of the rule of law itself. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). If we are to remain a "government of laws and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), our citizens must be at least presumptively "entitled" to

choose their course of conduct in light of "what the state commands or forbids," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), at the time they act.

Because MPPAA violates the fundamental right to notice and fair warning by imposing a new and unexpected liability for pre-enactment conduct not subject to prior regulation by ERISA, the Government must advance an extraordinary justification for the retroactive application of withdrawal liability. The rationales advanced—the need to deter conduct that prior Congresses had chosen to leave unregulated in the particular to which a subsequent Congress seeks to subject it to retroactive regulation and the need to insulate a government agency from undue exposure arising from its contractual obligations as an insurer—are insufficient justifications for depriving our citizens of their constitutional right to notice and fair warning.

ARGUMENT

I. THE RIGHT TO NOTICE AND FAIR WARNING IS A FUNDAMENTAL ONE.

There is no right more "fundamental to our scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), than the right of every citizen to notice and fair warning of the conduct regulated by law and the consequences thereof. Notice is an "elementary and fundamental requirement of due process." *Mennonite Bd. of Missions v. Adams*, 51 U.S.L.W. 4872, 4873 (U.S. June 22, 1983). The right to notice and fair warning of the conduct regulated by law and the consequences thereof is the founda-

tion of ordered liberty under law. "Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the state commands or forbids" so that they can govern their behavior accordingly. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

There can be few "principle[s] of justice [more deeply] rooted in the traditions and conscience of our people," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), than the principle that the Government must give notice and fair warning of what the law is to the citizen who is duty bound to regulate his behavior according to existing law. See *South East Chicago Comm'n v. HUD*, 488 F.2d 1119, 1122 (7th Cir. 1973); 1 Blackstone, *Commentaries* 46. The Government's duty to promulgate and the citizen's duty to obey go hand in hand. Retroactive lawmaking is the hallmark of tyranny.

If we are to remain a "government of laws and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), the citizen must be *at least presumptively* entitled to choose his course of conduct in light of the law in effect at the time he acts without fear of being held to account for that conduct pursuant to the terms of a later-enacted statute. Our concept of constitutional liberty becomes a cruel illusion if, as the Fourth Circuit ruled in *Republic*, the citizen is "required at peril of life, liberty or property to speculate," *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), on the outcome of bills pending in Congress. See 718 F.2d at 638. Vague laws are unconstitutional because they violate the right to "fair warning" that is the predicate for the "free[dom] to steer between lawful and unlawful conduct" and to avoid liability by altering conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As applied to pre-enactment conduct, MPPAA is unconstitutionally "vague" in "all of its [retroactive] ap-

plications," *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 490 (1982), because—no matter how clear the statutory language which came into being after the fact—it could not have given any citizen acting in advance of its enactment the notice, fair warning and opportunity required by the Due Process Clause to choose his course of conduct in light of "what the state commands or forbids." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Like vague laws, statutes which apply retroactively to pre-enactment conduct cripple the citizen's ability to regulate his behavior with due regard for the rights of others. They undermine the autonomy of the citizen, impair the dignity of man, and breed disrespect for the law. Creating new liability-imposing incidents after the fact is, quite simply, a capricious way of regulating the conduct of free and autonomous citizens. It is fundamentally unfair and unjust—indeed, it is arbitrary and irrational, *Untermyer v. Anderson*, 276 U.S. 440, 445 (1928)—to impose a disabling liability on a citizen who would have avoided it by altering his conduct but who cannot undo what already has been done.

That the right to notice and fair warning is a fundamental one is evident from this Court's precedents. The fundamental character of the right is implicit in this Court's void for vagueness decisions. The teaching was made explicit in *Marks v. United States*, 430 U.S. 188, 191-92 (1977). And, just last Term this Court again observed that notice is an "elementary and fundamental requirement of due process." *Mennonite Bd. of Missions v. Adams*, 51 U.S.L.W. 4872, 4873 (U.S. June 23, 1983), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

That the right to notice and fair warning is a fundamental one—or at least a sufficiently important one to require

the Government to advance an extraordinary justification for retroactive application of a statute, i.e., something more than that it is one of many expedient means to a legitimate legislative end—also lies at the heart of many of this Court's decisions declaring unconstitutional statutes which are retroactive in application.

Thus, in *Untermeyer v. Anderson*, 276 U.S. 440 (1928), this Court declared retroactive application of a new gift tax unconstitutional even though a final House-Senate conference report on the bill was near approval when the taxpayer made the gift which was not taxable under the law in effect at the time he acted. Responding to the contention that it was permissible to apply the statute to a transaction that occurred "while the bill containing the questioned provisions was in the last stage of progress through Congress," the Court ruled that the taxpayer "may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures." *Id.* at 445-46. Simply put, the citizen had a constitutional right to notice and fair warning secured by the Due Process Clause.

To be sure, this Court has never held that a civil statute which is retroactive in application is *per se* unconstitutional. There are few *per se* Rules of constitutional law. Thus, in addressing the constitutionality of statutes retroactive either in application or effect, the Court has left room for the play of its practical wisdom and the exigent circumstances of the day. It does not follow, however, that statutes which attempt to reach back in time and impose a new liability for pre-enactment conduct or which alter executed contractual relations should enjoy the strong presumption of constitutionality accorded to statutes prospective in application. Statutes which alter for the future the incidents of executory contracts formed prior to enact-

ment are not uncommon. They have produced mixed constitutional results.⁷ Compare, e.g., *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), with *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). But, outside the area of income taxation, the truly retroactive statute—one that creates a new liability triggered solely by pre-enactment conduct or one which alters the consequences of executed contracts—is rarely indulged and seldom sustained. E.g., *Helvering v. Helmholz*, 296 U.S. 93 (1935); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Nichols v. Coolidge*, 274 U.S. 531 (1927); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).

The cases which sustain the constitutionality of retroactive application of income taxes are truly "*sui generis*." *Peick v. PBGC*, 539 F.Supp. 1025, 1054 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983). Many involved alteration of only the rate of taxation, as opposed to the creation of a "new tax." *United States v. Darusmont*, 449 U.S. 292, 299-300 (1981). Statutes which alter the rate of taxation do not deprive the citizen of notice and fair warning of the conduct triggering the liability. Compare, e.g., *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928)

⁷ Of course, when the Government attempts to alter for the future its own contractual obligations, a heightened degree of judicial scrutiny applies. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 & n.25 (1977); *Nachman Corp. v. PBGC*, 592 F.2d 947, 959 n.23 (7th Cir. 1979). Compare, e.g., *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), with *Perry v. United States*, 294 U.S. 330 (1935). Heightened scrutiny should apply in this case because the declared purpose of imposing an unlimited withdrawal liability was to insulate PBGC, an agency of the United States, from undue exposure as the insurer of multiemployer pension plans. H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 57, *reprinted in* 1980 U.S. Code Cong. & Adm. News 2975; *see* PBGC Study, *supra* n.1, at 2, 10 n.16, 13-16, 94-98, 102-06. Simply put, it was to shift the costs and risks of PBGC's contractual obligations to private employers. *See* pp. 22-30 *infra*.

(new tax), with *Milliken v. United States*, 283 U.S. 15, 21 (1931) (new rate).

Moreover, there is special justification for retroactive application of tax statutes generally and of income tax statutes in particular. Taxes are simply "a way of apportioning the cost of government" from which "no citizen enjoys immunity" because all citizens share equally in the benefits thereof. *Welch v. Henry*, 305 U.S. 134, 146-47 (1938). And, an income taxpayer is unlikely to bite off his nose to spite his face, i.e., to refuse income, simply to avoid a tax liability triggered by its receipt. See *id.* at 148. Thus, when income taxes or excise taxes laid on profits derived from a past transaction are at issue, the Court has intimated that constructive notice of impending changes in the tax laws will suffice. See *United States v. Darusmont*, 449 U.S. 292, 299-300 (1981); *United States v. Hudson*, 299 U.S. 498, 501 (1937).

When the taxpayer could not have "reasonably . . . anticipated" the liability triggered by "the particular voluntary act which the statute later made the taxable event," however, this Court has declared retroactive application of statutes creating new taxes unconstitutionally "harsh and oppressive." *Welch v. Henry*, 305 U.S. 134, 147 (1938). Statutes which impose a new liability for pre-enactment conduct not previously regulated "in the particular" to which the citizen later objects, *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940), are harsh and oppressive because, however severely they impair the citizen's property interests, they also deprive the citizen of a significant liberty interest—the opportunity to choose his course of conduct in light of the law in effect at the time he acts. As the citizen "may justly demand to know when and how" he becomes subject to new taxes or civil liabilities triggered by pre-enactment conduct that may have been altered if fair warning had been given, con-

structive notice of impending changes in the law usually is not enough because the citizen "cannot foresee and ought not to be required to guess the outcome of pending measures." *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928).

The same principle is also embodied in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). To be sure, the Court observed therein that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" even when "the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 16. But, as the Court observed, "It does not follow, however, that what Congress can legislate prospectively, it can legislate retrospectively." *Id.* And, although not specifying what degree of special scrutiny governed retroactive legislation, the Court made crystal clear that the justifications advanced for prospective legislation "may not suffice" for retrospective legislation and must take into account "[w]hether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct." *Id.* at 17 & n.16; accord, *Adams Nursing Home of Williamston, Inc. v. Matthews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977).

In *Turner Elkhorn* there was no reason to believe that the employers would have altered their conduct had the statute been in effect at the time the incidence of pneumoconiosis occurred. Indeed, they did not even press the contention. 428 U.S. at 17. They had "clearly been aware of the danger of pneumoconiosis for at least 20 years," as well as their duty to compensate workers for physical injuries caused by dangerous working conditions. *Id.* The tort liability⁸ imposed was well within the mainstream of

⁸ There is a justification for the retroactive imposition of liability in tort that does not apply to the retroactive alteration of ex-

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longstanding and "familiar principles of workmen's compensation." *Id.* at 781 (Powell, J., concurring).

Moreover, the actual retroactivity of the statute at issue in *Turner Elkhorn* bordered on the *de minimis*. The disease was a progressive one whose "symptoms may become apparent only after a miner has left the coal mines." *Id.* at 7-8. And, though the statute had "some retrospective effect" insofar as it required compensation for present injury "bred" in the past, *id.* at 15-16, in actual application it was almost entirely prospective. Because of the progressive and late-manifesting character of the disease and because the Government paid almost all claims filed in the first few years after enactment, the employers were "not ordinarily [held] liable for any disabilities maturing before enactment."⁹ *Id.* at 8-10, 15 & nn. 14, 18. Read

* *continued*

executed contractual relationships. Tortious conduct causing the physical injury which triggers the duty to compensate is unlikely to have been altered even if notice and fair warning of the statutory liability had been given. Because contractual relationships are planned and bargained for, their retroactive alteration is more likely to disrupt legitimate expectations on which the parties have relied. *Turner Elkhorn*, thus, can be harmonized with *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935). As this Court said in *Turner Elkhorn*, there is a critical distinction between retroactive alteration of the compensation package bargained by the parties in *Alton*, insofar as the statute rewrote the terms and conditions of an executed contractual relationship, and the imposition of a duty to compensate for present physical injury caused by past working conditions controlled by an employer. See 428 U.S. at 19 & n.18.

* When tortious conduct gives rise to a physical injury that does not manifest itself until after enactment of a statute, or when a statute "merely enlarge[s]" the remedy for breach of a pre-existing duty of due care, "in truth there is no retroactivity." *Norfolk, B & C Lines, Inc. v. Director*, 539 F.2d 378, 380-81 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977). Statutes which impose liability in tort for physical injuries of a continuing character are not retroactive in the same sense as a statute like MPPAA is, as the tort itself is not complete until the resulting injury has matured.

as a whole and in light of the factual context of the case and the arguments actually advanced to the Court, *Turner Elkhorn* does not hold that statutes retroactive in application are entitled to the same presumption of constitutionality accorded statutes which, though having some retrospective effects, are prospective in application. Like the statute at issue in *Nachman*, and unlike MPPAA, the statute upheld in *Turner Elkhorn* had retrospective effects but was almost entirely prospective in application.

This distinction is of critical significance. A somewhat deferential standard of review for legislation which has some retrospective effects but which is prospective in application may be appropriate. A statute like MPPAA, however, should trigger a different standard of review. By imposing a new and unexpected liability for pre-enactment conduct, statutes which are wholly retroactive in application infringe the fundamental right to notice and fair warning that is a presupposition of any rule of law. This Court should now make explicit what already is implicit in its precedents. When Congress seeks to legislate retroactively with respect to *past* acts and *executed*,¹⁰ as opposed to executory, contractual obligations, it must have an extraordinary justification for retroactive application of statutes creating a new and unexpected liability for pre-enactment conduct.

¹⁰ In *Louisville & N.R. v. Mottley*, 219 U.S. 467 (1911), this Court held that Congress could declare invalid for the future a lifetime free pass issued by a railroad. Had Congress also attempted to make the holders thereof pay for trips previously taken, however, a different result surely would have been reached. *E.g.*, *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922). Gray's contractual obligation to the Carpenters Fund had terminated at the time of MPPAA's enactment.

II. RETROACTIVE APPLICATION OF MPPAA IMPAIRS THE FUNDAMENTAL RIGHT TO NOTICE AND FAIR WARNING AND DISRUPTS THE OPERATION OF POLITICAL CHECKS DESIGNED BY THE FRAMERS.

That retroactive application of MPPAA impairs the fundamental right to notice and fair warning by imposing a new and unexpected liability for pre-enactment conduct cannot be doubted. Prior to MPPAA, no employer contributing to a multiemployer pension plan had any federal statutory duty to pay any money to the pension funds. There was no such thing as "withdrawal liability," and the cessation of contributions to a multiemployer fund did not trigger the imposition of liability on any employer.

Employers were subject to a contingent termination liability under the pre-MPPAA provisions of ERISA, a reimbursement liability payable to PBGC that was prospectively applied and scrupulously limited to 30% of an employer's net worth, which this Court has characterized as a "reasonable ceiling" on employer liability,¹¹ *Nachman*

¹¹ ERISA also contained a provision for hardship relief whereby employers could be absolved of all liability. 29 U.S.C. § 1304(f)(4) (1976), discussed in *Nachman Corp. v. PBGC*, 446 U.S. 359, 383 & n.34 (1980). It also had a provision mandating a system whereby employers could insure themselves against withdrawal liability, 29 U.S.C. § 1323 (1976), a system that was never implemented and later repealed by MPPAA because neither PBGC nor private insurers would accept the risks of insuring the liabilities of multi-employer pension funds allocated as withdrawal liability. H.R. Rep. No. 96-869, Part II, 96th Cong., 2d Sess. 63, reprinted in 1980 U.S. Code Cong. & Adm. News 5908. The existence of these moderating provisions and the 30% of net worth cap were central to the Seventh Circuit's holding in *Nachman* that the prospective application of termination liability withstood constitutional scrutiny. 592 F.2d at 962-63. Unlike ERISA, which "careful[ly] . . . approached the problem of retroactivity," 446 U.S. at 382, MPPAA imposes a new and unlimited withdrawal liability on the basis of pre-enactment conduct without any provision for hardship relief or an employer-insurance option.

Corp. v. PBGC, 446 U.S. 359, 386 (1980) (emphasis added). 29 U.S.C. §§ 1362(b)(2), 1364 (1976). The liability was not triggered by an employer's cessation of contributions but rather was contingent upon a fund's termination and PBGC's discretionary election to insure unfunded benefits upon plan termination.

Indeed, under the pre-MPPAA provisions of ERISA, the act later defined as a "withdrawal" by MPPAA—the cessation of contributions—was a liability-mitigating act because the reimbursement liability paid to PBGC on plan termination was owed only by those employers which had contributed to the plan during the five years prior to its termination. Thus, what was a liability-mitigating act under ERISA *retroactively* became a liability-creating act under MPPAA.

To suggest as some lower courts have that MPPAA did not impose any new or unexpected liability on employers simply flies in the face of reality.¹² *Compare, e.g., Peick*

¹² Republic agreed to buy Johnson's stock in May 1978 at its book value as reflected in Johnson's audited financial statements and in "complete reliance" thereon. Riss Affidavit ¶¶ 9, 14, *Republic* App. 152a-153a. Those statements did not disclose any contingent termination liability created by ERISA arising out of Johnson's participation in multiemployer pension funds. *See id.* ¶ 16, at 153a.

Prior to enactment of MPPAA, the unfunded vested benefit liability of multiemployer pension plans was not generally treated as a liability of contributing employers under generally accepted accounting principles. *See* Accounting Principles Board ("APB"), Opinion No. 8 (Nov. 17, 1966), Financial Accounting Standards Board ("FASB"), Interpretation No. 3 of APB Opinion No. 8 (Dec. 1974), FASB, Statement of Financial Standards No. 36 (May 1980), *reprinted in* FASB, *Financial Accounting Standards—Original Pronouncements as of June 1, 1982* ("Original Pronouncements"), at 149-65, 1289-93, 2033-34 (1982) (Lib. Cong. Cat. No. 82-70424). In practice, multiemployer pension plans generally were considered defined contribution plans for accounting purposes prior to enactment of MPPAA, and a company's share of a plan's unfunded vested benefit liability usually was not even disclosed in footnotes

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v. PBGC, 539 F.Supp. 1025, 1044-46 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983), with Riss Affidavit ¶¶ 9, 14 & 30, Republic App. at 152a-153a, 157a, and n.12 *supra*. Even if the conduct triggering the liability was the same under ERISA and MPPAA, which it is not, even if withdrawal liability were payable to the same entity as termination liability, which it is not, and even if the liability were measured in the same way, which it is not, the difference between a contingent liability limited to 30% of net worth and a fixed liability that may, and in many cases does, substantially exceed an employer's entire net worth is a difference so radical that Congress erroneously thought it would start a stampede of employers out of multiemployer funds. See pp. 25-26 *infra*.

Nor is there any principled basis for concluding that the pre-enactment legislative history of MPPAA gave employers fair warning of their potential liability. Though

¹³ *continued*

to its financial statement. See American Institute of Certified Public Accountants, *Illustrations and Analysis of Disclosures of Pension Information—A Survey of the Application of FASB Statement No. 36, An Amendment of APB Opinion No. 8*, at 11-13 (1981).

In recognition of the "new funding requirements and obligations for employers that participate in multiemployer pension plans" created by MPPAA, the FASB has undertaken a major review of the principles governing the accounting and disclosure of pension plan liabilities that would take into account "the effects of the Act." FASB, Technical Bulletin No. 81-3 (Feb. 1981), *reprinted in Original Pronouncements*, at 4039. The discussion memorandum recently released by the FASB may result in a new approach being taken to accounting for, and disclosure of, the liabilities associated with multiemployer plans. See FASB, *An Analysis of Additional Issues Related to Employers' Accounting for Pensions and Other Postemployment Benefits* 31-37 (Apr. 19, 1983). Any forthcoming changes, however, will come too late to aid the employers sandbagged by retroactive application of MPPAA who acted in reliance on pre-existing law and accounting principles framed in light thereof.

this Court has on rare occasion adverted to pre-enactment legislative developments as affording citizens some warning of what the law was to become, it has done so only in cases in which there was little reason to believe that a citizen would have altered his course of conduct in any event. See *United States v. Darusmont*, 449 U.S. 292, 299-300 (1981); *United States v. Hudson*, 299 U.S. 498, 501 (1937); pp. 11-12 *supra*.

When a statute alters only the rate of taxation or adjusts merely the procedural or remedial consequences of primary conduct that already was subject to prior regulation "in the particular" to which the citizens objects, *Veix v. Sixth Ward Bldg. Ass'n*, 310 U.S. 32, 38 (1940), the citizen has little ground to complain that he has been deprived of fair warning of the conduct triggering the liability. Cf. *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). But the wholesale revision of the regulatory scheme effected by MPPAA hardly amounts to a "tinkering" with prior law. And, however widely publicized the Congressional deliberations may or may not have been, the fact of the matter is that many employers, including Republic, did not know what Congress had in mind for them and "would have avoided the liability by altering [their] conduct." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 n.16 (1976). See Riss Affidavit ¶ 30, Republic App. at 156a. Republic, however, never had an opportunity to choose between corporate life and death. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 264 (1978) (Brennan, White & Marshall, JJ., dissenting).

This is a big country. Not everyone lives in Washington, D.C. or has the wherewithal to stay current with the thousands of bills introduced in Congress each year and to track their transmutations as they wind their way through the legislative labyrinth. That persons as sophisticated as the officers and directors of Republic and the

attorneys and accountants who advised them, see Riss Affidavit ¶¶ 2-5, 30, *Republic* App. 150a-151a, 157a, were unaware of the bills which ultimately evolved into MPPAA shows how specious and dangerous the fiction of pre-enactment notice is.¹³

It is one thing to say that the citizen has a duty to know what existing law is. Government could not function if ignorance of the law were routinely recognized as a defense to the imposition of criminal or civil liability. It is quite another thing, however, to say that the citizen also has a duty to know the terms and conditions of every bill proposed in Congress and to regulate pre-enactment conduct on the basis of speculation as to what the law will become.¹⁴ This Court should squarely reject that notion now, as it has in the past. *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928). The citizen should not be required, "at peril of life, liberty or property to speculate,"

¹³ PBGC intimates that retroactive application of MPPAA can be justified on the theory that citizens are "culpable" for failing to read every page of the *New York Times* and the *Wall Street Journal* every day. See PBGC Brief at 35 & n.33. The truth is that the legislative evolution of MPPAA was not front-page news in newspapers of general circulation throughout this big country. But, even if it were, the newspaper accounts on which PBGC relies at most gave notice of actions taken by Congressional committees on a pending bill. A bill is not law, and actual or constructive notice of action on pending bills is not the notice of "what the state commands or forbids" to which the citizen is constitutionally "entitled." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). See also *Tezaco, Inc. v. Short*, 102 S.Ct. 781 793 (1982).

¹⁴ If the citizen not only has a duty to know the terms and conditions of every bill pending in Congress but also to regulate pre-enactment conduct on the basis thereof, it would follow that the attorneys and accountants who failed to advise the directors of Republic and Johnson that the termination of Johnson's operations would expose Johnson and Republic to a liability exceeding the combined net worths of both companies are guilty of malpractice *per se*. See Riss Affidavit ¶¶ 9, 14, 16, 30, *Republic* App. at 152a-153a, 157a. But see n.12 *supra* & pp. 21-22 *infra*.

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), on the outcome of bills pending in Congress.

We have constitutionally mandated processes for the enactment of law, processes that the Framers deliberately made unwieldy and inefficient to serve "essential constitutional functions" and "to protect the people from the improvident exercise of power" by their representatives in the political branches. *INS v. Chadha*, 103 S.Ct. 2764, 2787 (1983). That retroactive application of a statute may be "efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 2780-81. Because a bill cannot become part of the law of the land until it has passed through all the constitutional processes mandated by the Framers, it makes no sense to say that a bill proposed in Congress can give constitutionally adequate notice and fair warning of what the law is before the bill even becomes law.¹⁵

¹⁵ In fact, Senator Armstrong remarked that a clean copy of S. 1076, which had been amended 335 times between committee and full Senate consideration, was not even *available* on the Senate floor at the time the Senate passed its first version of what ultimately evolved into MPPAA. 126 Cong. Rec. S 10168 (daily ed. July 29, 1980). In his view, the Senate was "[f]umbling half blind through a bill" that it did not understand. *Id.*

If a member of Congress has no access to a copy of a bill at the time he votes on it, how can a private citizen fairly be charged with knowledge of its contents? And, though some lower courts have observed that the House bill passed on May 22, 1980 and the Senate bill passed on July 29, 1980 were "substantially similar," *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 638 (4th Cir. 1983), *petn. for cert. pending*, No. 83-541 (U.S.), in fact there were substantial differences between them. For example, the so-called "trucking industry" exemption now embodied in 29 U.S.C. § 1383(d), which states that a permanent cessation of contributions is not a "withdrawal" in certain circumstances, was added by Senate floor amendment on July 29, 1980. 126 Cong. Rec. S 10106,

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Retroactive regulation of pre-enactment conduct not only impairs the citizen's fundamental right of fair warning but also impairs the operation of political checks built into the Constitution by the Framers. One of the most important is that the whole House must stand for election every two years. U.S. Const. Art. I, § 2, cl. 1. In a very real sense, we have a new Congress every two years. As the personality of the Congress changes, so also do its policy judgments. All statutes which are retroactive in *application* tend to impair to some degree the political checks wrought by the Framers. They deliberately made it hard to make law. A subsequent Congress can regulate primary conduct that prior Congresses chose to leave *unregulated*, but only after a bill goes through all the constitutional processes mandated by the Framers. *INS v. Chadha*, 103 S.Ct. 2764 (1983). Until then, the particular regulatory scheme deemed necessary and appropriate by prior Congresses remains the law of the land, and our citizens should be *at least presumptively* entitled to act in reliance thereon.

III. THERE IS NO PRINCIPLED JUSTIFICATION FOR RETROACTIVE APPLICATION OF MPPAA.

Protection of the retirement benefits of millions of Americans is surely a worthy goal to pursue. It does not follow, however, that Congress can use any means it chooses to attain that goal. The means chosen must not only have a rational relation to the goal in the expedient

¹⁵ *continued*

10201 (daily ed. July 29, 1980). If the differences between the House and Senate bills were as miniscule as some lower courts have suggested, why is it that the two houses of Congress could not reach agreement on a common bill until September 18 and 19, 1980, respectively? 126 Cong. Rec. S 12901 (Sept. 18, 1980); 126 Cong. Rec. H 9180 (Sept. 19, 1980).

sense that the means tend to effectuate achievement of the goal, but also must be otherwise consistent with the Constitution. The means chosen by Congress to achieve its goal—the retroactive imposition of a new liability triggered by pre-enactment conduct—has little to commend it as a practical matter and much to condemn it as a constitutional matter.

When Congress first considered mandatory insurance for multiemployer plans when enacting ERISA, there was doubt whether the scheme would be feasible without recourse to public funds. *See, e.g.*, H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Adm. News 4666. Accordingly, Congress deferred mandatory coverage for multiemployer plans until January 1, 1978. H. Conf. Rep. 93-1290, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Adm. News 5160. As the date for mandatory coverage neared, alarm was expressed that PBGC might not have the resources needed to insure multiemployer plans, so Congress deferred coverage and directed PBGC to study the feasibility of the insurance program. Pub. L. No. 95-214, 91 Stat. 1501 (1977).

In the report submitted to Congress on July 1, 1978, PBGC observed that, prior to ERISA, "terminations of multiemployer funds were *extremely rare*." PBGC Study, *supra* n. 1, at 4 (emphasis added). But ERISA, Congress's prior "cure," had aggravated the financial problems of multiemployer funds by imposing unbargained-for minimum vesting requirements that doubled, trebled or quadrupled their unfunded vested benefits liabilities, *Lo Cicero Affidavit* ¶¶ 14, 16.11, *Republic App.* at 190a-193a, and by "restrict[ing] some of the action plans previously took to avert a termination," PBGC Study, *supra* n. 1, at 4, such as reducing benefit levels.¹⁶ Prior to ERISA, multi-

¹⁶ Unlike single-employer plans wherein benefit levels are collectively bargained, as in *Nachman Corp. v. PBGC*, 446 U.S. 359,

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employer plans had a number of ways of dealing with employer withdrawals, self-help remedies restricted by ERISA. *Id.* at 94. MPPAA was a "cure" for a "disease" that, in large measure, was caused by Congress's enactment of ERISA. *Id.* at 4, 15-17, 22-24, 94.

Not surprisingly, PBGC also reported that mandatory insurance would not be feasible if PBGC, a government agency, had to bear the burden of insuring the "inherited liabilities" of multiemployer plans. *Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives*, 95th Cong., 2d Sess. 23 (1978) [hereinafter "*Hearings*"]. They had come into being because plan trustees had promised more benefits than the collectively bargained contributions could fund, because economic forces had eroded plan contribution bases, and because ERISA had mandated unbargained-for minimum vesting requirements and precluded traditional self-help remedies for the problem of employer withdrawals. *Lo Cicero Affidavit* ¶¶ 14-15, 16.11-14, *Republic App.* at 190a-193a. PBGC feared that the "cure" of mandatory insurance would create a new "disease"—increased terminations of underfunded plans. Because the employers' reimbursement liability to PBGC was limited by ERISA to 30% of net

¹⁸ *continued*

363-65 & n.5 (1980), multiemployer plans are based on defined contributions established by collective bargaining agreements that do not obligate the contributing employers to fund a defined level of benefits. Rather, benefits are independently established by the fund trustees, who owe a fiduciary duty of undivided loyalty to plan participants, *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-37 (1981), based on their actuary's estimate of the amount of benefits that can be funded with the defined contributions. Prior to ERISA, benefit levels could be adjusted, i.e., reduced, if plan trustees and actuaries had miscalculated the amount of benefits that the collectively bargained contributions could fund. ERISA precluded that.

worth, while PBGC would have a contractual duty to pay most of the participants' vested benefits, a mandatory insurance scheme would create incentive for union-employer cooperation in terminating underfunded plans. PBGC Study, *supra* n. 1, at 23, 96-97.

PBGC's proposed cure for the disease that would be created by a mandatory insurance program was to make employers pay the "inherited liabilities" of the funds that PBGC otherwise would have a contractual duty to insure. *Hearings* at 23. It proposed that an employer withdrawing from a multiemployer fund be required to pay "its fair share" of the plan's liabilities. *Id.* (Republic's "fair share," of course, substantially exceeds its entire net worth, as well as the cumulative net earnings of Johnson over the 35 years of its corporate existence! *Riss Affidavit* ¶ 44, *Republic App.* at 161a.)

So, in arriving at "equitable solutions" to the problem of the plans' inherited liabilities, H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 63, *reprinted in* 1980 U.S. Code Cong. & Adm. News 2931-32, Congress imposed unlimited withdrawal liability on employers but, not surprisingly, declined to pay its "fair share" of the inherited liabilities—the share that Congress had created by enacting unbargained-for minimum vesting requirements and benefit-reduction prohibitions in ERISA.

There was, however, a problem with the supposed "cure" of unlimited withdrawal liability. The treatment proposed was so radical that it would create yet another "disease"—employer incentive to withdraw before the withdrawal liability "cure" went through the constitutional processes mandated by the Framers for becoming part of the law of the land. PBGC Study, *supra* n. 1, at 105-06. So PBGC and Congress devised an even more radical "cure" for this additional, short-lived, "disease"—the

retroactive imposition of unlimited, unanticipated and unbargained-for withdrawal liability. Threatening the retroactive application of withdrawal liability in a bill that was not yet part of the law of the land would deter the "rush to leave a plan before the [otherwise prospective] effective date of the new withdrawal rules" and would protect the solvency of the funds even if deterrence did not work. *Id.* at 106.

The stampede of employers that PBGC feared and predicted did not occur. 126 Cong. Rec. S 10101 (daily ed. July 29, 1980) (remarks of Sen. Javits). Many employers were unaware of the pending bills. More important, although the articulated justification for retroactive application of MPPAA was to deter "opportunistic" employers, 126 Cong. Rec. S 10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga), from withdrawing while Congress was still debating what the law of the land ought to become, there was no need to use such extraordinary means to deter voluntary withdrawals. Long-term collective bargaining agreements mandating multiemployer plan contributions precluded the "voluntary withdrawals" that PBGC and Congress were seeking to deter. PBGC Study, *supra* n. 1, at 97. In fact, the manner in which Congress defined "withdrawal" virtually guaranteed that the retroactively imposed liability would fall on those least able to bear the burden of funding the inherited liabilities that PBGC sought to escape from. *See* n.6 *supra*.

Solvent employers that were able to compete and make a profit in the marketplace had no incentive to go out of business to escape the obligation to contribute imposed by existing collective bargaining agreements. Moreover, even if their existing agreements terminated during MPPAA's consideration, they would be unlikely to successfully negotiate a "withdrawal," i.e., a cessation of pension plan contributions, through collective bargaining.

The employers sandbagged by retroactive application of MPPAA are, by and large, employers like Johnson that "escaped" the contribution obligation imposed by their collective bargaining agreements by going out of business because of economic hardship, or employers like Gray that were unable to negotiate a mutually acceptable collective bargaining agreement after expiration of the agreement imposing the duty to contribute whose cessation now constitutes "withdrawal." 29 U.S.C. § 1383(a).

It is no accident that the withdrawal liability claims asserted against the employers caught unawares by retroactive application of MPPAA often approach or even exceed the entire net worth of the companies affected. Declining industries are a product of economic forces that cannot be deterred by the retroactive imposition of withdrawal liability. The companies effecting pre-enactment withdrawals from plans covering declining industries did so because they were suffering from the economic decline. Wittingly or unwittingly, the legislative scheme was designed in such a way that its retroactive application would catch pre-enactment "withdrawals" that usually were caused by economic forces beyond the control of the employers involved,¹⁷ as opposed to "evasive" withdrawals of solvent employers.

In fact, the asserted justification for the retroactive imposition of withdrawal liability is at war with what Con-

¹⁷ Indeed, even as applied prospectively, the employers being caught by withdrawal liability are not those which withdraw in order to escape pension funding obligations, but rather for other reasons that often are totally outside their control. *E.g.*, *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 81-2738-S (D. Mass. Aug. 3, 1983) (eminent domain taking of employer's work site), *appeal docketed*, No. 83-1804 (1st Cir.); *Aronson Tire Co. v. Pisano*, No. 81-2554 (D. Mass. filed Oct 7, 1981) (employee decertification of bargaining representative). *See also* n.20.

gress actually did. It moved the retroactive effective date forward from February 27, 1979 to April 29, 1980, not because it had grounds to fear a post-April stampede of "opportunistic" employers or because the Senate Finance Committee needed more time to study legislative proposals that had been under study for years, but rather—as one of MPPAA's most vigorous proponents was honest enough to admit—simply because of "strong political pressures by certain withdrawing employers who were caught by the earlier date." 126 Cong. Rec. S 10101 (daily ed. July 29, 1980) (remarks of Sen. Javits).

If there was dire need to deter "opportunistic" employers from withdrawing, what principled justification exists for moving the retroactive effective date forward at the behest of the very "opportunistic" employers at which the retroactive effective date purportedly was aimed? There is none, except the same justification that led Congress to shift the burden of paying the funds' "inherited liabilities" from PBGC to contributing employers in the guise of withdrawal liability in the first place—political expediency. It being a politically expedient thing to enlarge and insure the retirement benefits of millions of voters without having to raise taxes to pay for them, MPPAA passed Congress with nary a dissent. Even its most vociferous critics and those who felt the Congress was "[f]umbling half blind" through a bill that it did not understand, 126 Cong. Rec. S. 10168 (daily ed. July 29, 1980) (remarks of Sen. Armstrong), voted for MPPAA. It would have been political suicide not to do so.

The articulated justifications for retroactive application of a "withdrawal liability" that commonly approaches or exceeds the net worth of the employers sandbagged by it cannot withstand scrutiny. This Court should be skeptical when the political branches seek to shift the burden of inherited liabilities that are in no small measure of their own making from a government agency that otherwise

would have had a contractual duty as insurer to pay for them.¹⁸ See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 & n. 25 (1977); *Perry v. United States*, 294 U.S. 330 (1935). This Court should be very "hesitant" to permit the political branches to justify the retroactive imposition of a new liability triggered by pre-enactment conduct "on any theory of deterrence . . . or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). This Court should be skeptical of any cost-benefit analysis advanced to justify the confiscation of an employer's entire net worth, particularly when Congress has declined to pay its fair share of the inherited liabilities it created.¹⁹ See *id.* at 8-9; *Nachman* (7th Cir.), 592 F.2d at 961 & n. 31. And, this Court should have a solicitous regard for the citizen's fundamental right to notice and fair warning, for it is a "presupposition" of any "rule of law." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

For reasons of political expediency, not genuine necessity, Congress chose an unreasonable and immoderate means to a worthy end. The retroactive imposition of a

¹⁸ It is noteworthy that, prior to enactment of MPPAA, PBGC was placed under a legislative mandate to insure multiemployer plans as of August 1, 1980. Pub.L. No. 96-293, 94 Stat. 610 (1980).

¹⁹ The imposition of crushing withdrawal liabilities on employers hardly can be justified on the ground that it represents a "rational measure to spread the costs of the employees' [benefits] to those who have profited from the fruits of their labor." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). The withdrawal liability asserted against Johnson, for example, exceeds not only the combined net worth of Johnson and Republic but also the cumulative net earnings of Johnson over the 35 years of its corporate existence. Riss Affidavit ¶ 44, *Republic App.* at 161a. For companies effecting "withdrawals" because they went out of business, the cost of withdrawal liability obviously cannot be passed on to consumers. See 428 U.S. at 18-19. And, because the liability imposed on them is not limited to the unfunded liability attributable to their own employees, it cannot be rationalized as "an actual, measurable cost" of their own businesses. *Id.* at 19.

crippling and unanticipated "withdrawal liability" on those least able to bear the burden thereof²⁰ has little to commend it as a practicable solution to the problems Congress sought to address and, more important, much to condemn it as a constitutional matter.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

Of Counsel

LESTER M. BRIDGEMAN
LOUIS T. URBANCZYK
304 Capital Gallery East
600 Maryland Avenue, SW
Washington, DC 20024
(202) 484-5911

Respectfully submitted,

PHILIP B. KURLAND*
CHRISTOPHER G. WALSH, JR.
Two First National Plaza
Suite 1500
Chicago, IL 60603
(312) 372-2345

*Counsel of Record

²⁰ MPPAA imposes crushing burdens on companies in or near bankruptcy though only a few pension funds have real need. Of the \$312.7 million in withdrawal liability identified by the Central States Fund as of October 1983, \$231.7 million was allocable to bankrupt companies. Statement of George W. Lehr, Executive Director, Central States, Southeast and Southwest Areas Pension Fund, before the American Trucking Associations Industrial Relations and Personnel Practices Committees, *Transport Topics*, Oct. 24, 1983, at 11. The Fund itself, in contrast, is "very healthy both in terms of membership and financial performance." *Id.* Its unfunded liability is "dwindling rapidly," and it expects to be fully funded by 1990. Interview of George W. Lehr, BNA Daily Labor Report No. 126, June 29, 1983, at C-2.

Recent data suggests that PBGC's Study overstated the financial problems of multiemployer plans. A 1983 survey of 458 multiemployer plans spanning a wide variety of industries revealed that two-thirds were fully funded for vested benefits; that the plans were 90% funded on average; and that only 5% were less than half funded. Martin E. Segal Co., *A Survey of the Funded Position of the Multiemployer Defined Benefit Plans* (July 20, 1983), available on request, Director of Information Services, Martin E. Segal Co., 730 Fifth Avenue, N.Y., N.Y. 10019.

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Nos. 83-245, 83-291

**In The
Supreme Court of the United States**

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

vs.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
Appellant,

vs.

R. A. GRAY & COMPANY,
Appellee.

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**MOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
OF SIBLEY, LINDSAY & CURR COMPANY**

William L. Dorr*

James M. Quinn

HARRIS, BEACH, WILCOX,
RUBIN & LEVEY

*Attorneys for Amicus Curiae
Sibley, Lindsay & Curr Company*

Two State Street

Rochester, New York 14614

Telephone: (716) 232-4440

**Counsel of Record*

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**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**MOTION FOR LEAVE TO FILE
A BRIEF AMICUS CURIAE**

Sibley, Lindsay, and Curr Company ("Sibley's"), through its attorneys, Harris, Beach, Wilcox, Rubin & Levey, respectfully moves this Court for leave to file the accompanying brief as amicus curiae in this appeal. Sibley's brings this motion because appellant, Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to Sibley's filing a brief amicus curiae. Sibley's has been assessed retroactive withdrawal liability under the Multi-employer Pension Plan Amendments Act of 1980 (the "MP-PAA") as a result of its withdrawal from a multiemployer

pension plan nearly four months prior to the MPPAA's enactment. Sibley's successfully challenged the constitutionality of the retroactive provisions of the MPPAA in the United States District Court for the Western District of New York. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F.Supp. 32 (W.D.N.Y. 1983). However, on January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the amendment's constitutionality. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, No. 83-7328 (2d Cir. Jan. 9, 1984). The facts and circumstances surrounding the retroactive imposition of MPPAA withdrawal liability against Sibley's, however, are distinctly different from the circumstances surrounding the retroactive imposition of MPPAA withdrawal liability against R. A. Gray & Company ("Gray"), the appellee in this appeal.

Sibley's, a division of Associated Dry Goods Corporation, operates retail department stores in Rochester, New York and other upstate New York cities. For many years prior to May 31, 1980, Sibley's operated a bakery at its Main Street, Rochester store.

At all relevant times, the Bakery, Confectionery and Tobacco Workers International Union of America (the "Union") represented bakery employees for purposes of collective bargaining. Pursuant to its collective bargaining agreements with the Union, Sibley's contributed to the Bakery & Confectionery Union & Industry International Pension Fund (the "Fund"). Sibley's never bargained to provide specific pension benefits to its former employees. Rather, Sibley's and the Union agreed that Sibley's contributions to the Fund were to be at a fixed rate, a certain sum for each hour worked by bakery employees. The Fund's trustees were solely responsible for establishing and funding pension benefit levels, and Sibley's never assumed liability should the Fund be unable to finance a certain level of benefits.

Financial losses attributable to its bakery operation compelled Sibley's to close the operation and terminate the employment of forty-three bakery workers on May 31, 1980. Prior to the closing date, Sibley's and the Union negotiated an agreement which fixed Sibley's obligations upon the closing (the "bakery closing agreement"). This agreement required Sibley's to pay its bakery employees for all earned vacation days and unused personal holidays and to pay an additional sum to each employee as severance pay. Sibley's collective bargaining agreement with the Union required it to make contributions to the Fund with respect to hours for which pay was received by bakery employees under the bakery closing agreement. Sibley's and the Union expressly agreed that the bakery closing agreement set forth all of Sibley's obligations under its collective bargaining agreement upon the closing of the bakery. Sibley's completely performed its contractual obligations under the bakery closing and collective bargaining agreements with the Union.

In a letter dated August 29, 1980, the Fund notified Sibley's that its participation in the Fund had terminated on the date the bakery closed, May 31, 1980. At the time Sibley's bakery closed, the Employee Retirement Income Security Act ("ERISA") delineated Sibley's potential liability upon its withdrawal. ERISA imposed no withdrawal liability on Sibley's unless the Fund were to terminate within five years of Sibley's withdrawal and limited Sibley's potential liability to thirty percent of its net worth.

On September 26, 1980, nearly four months after the closing of Sibley's bakery, Congress enacted the MPPAA. The MPPAA radically amended ERISA and retroactively imposed withdrawal liability upon any employer who completely or partially withdrew from a multiemployer pension plan after April 28, 1980. The Fund notified Sibley's by letter dated May 11, 1981 that it had computed Sibley's withdrawal liability to be \$315,927.00.

The burden of this retroactive penalty is significant. Sibley's alleged withdrawal liability is three-quarters of its total contributions to the Fund for the ten years prior to its withdrawal. Prior to the bakery closing, Sibley's and the Union had negotiated an agreement which set forth all of Sibley's obligations to its former employees and the Union upon the closing of the bakery. The retroactive assessment of MPPAA withdrawal liability against Sibley's completely abrogated this agreement.

It is the existence of this negotiated agreement limiting Sibley's withdrawal liability that sets Sibley's apart from R. A. Gray & Company. An understanding of the effect of the MPPAA upon Sibley's will provide this Court with a valuable additional perspective in analyzing the constitutionality of this amendment. Sibley's arguments may not otherwise be heard in the course of this appeal.

If Sibley's argument were to be adopted by this Court, the decision of the United States Court of Appeals for the Ninth Circuit holding the MPPAA to be unconstitutional would be affirmed.

HARRIS, BEACH, WILCOX,
RUBIN and LEVEY

By: _____
William L. Dorr
*Attorneys for Sibley, Lindsay
& Curr Company*
Two State Street
Rochester, New York 14614
(716) 232-4440

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HARRIS, BEACH, WILCOX,
RUBIN & LEVEY

*Attorneys for Amicus Curiae
Sibley, Lindsay & Curr Company*

Two State Street

Rochester, New York 14614

Telephone: (716) 232-4440

**Counsel of Record*

QUESTION PRESENTED

In enacting the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), did Congress violate the due process clause of the fifth amendment by retroactively imposing substantial withdrawal liability upon employers who withdrew from multiemployer pension plans during the five months prior to the amendment's enactment?

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**ON APPEAL FROM THE UNITED STATES COURT
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**BRIEF AMICUS CURIAE OF
SIBLEY, LINDSAY & CURR COMPANY**

INTEREST OF SIBLEY, LINDSAY & CURR COMPANY

Sibley, Lindsay & Curr Company ("Sibley's") presents this Brief Amicus Curiae to assist the Court in determining whether Congress violated the due process clause of the fifth amendment by retroactively imposing withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA") on employers who withdrew from multiemployer pension plans before the MPPAA was enacted on September 26, 1980, but on or after its retroactive effective date of April 29, 1980.

Sibley's is a division of Associated Dry Goods Corporation and operates retail department stores in Rochester, New York and other upstate New York cities. For many years prior to May 31, 1980, Sibley's operated a bakery at its Main Street, Rochester store. Sibley's has been assessed liability in connection with its withdrawal from the pension fund covering its bakery employees during the "window period" between the MPPAA's enactment and its retroactive effective date. Sibley's successfully challenged the MPPAA's constitutionality in the United States District Court for the Western District of New York. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F.Supp. 32 (W.D.N.Y. 1983). However, on January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the amendment's constitutionality. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, No. 83-7328 (2d Cir. Jan. 9, 1984).

At all relevant times, the Bakery, Confectionery, and Tobacco Workers' International Union of America (the "Union") represented Sibley's bakery employees for purposes of collective bargaining. Pursuant to contracts negotiated with the Union, Sibley's contributed to the Bakery and Confectionery Union and Industry International Pension Fund (the "Fund"). Sibley's never bargained to provide specific pension benefits to its former employees. Rather, Sibley's and the Union agreed that Sibley's contributions to the Fund were to be at a fixed rate, a certain sum for each hour worked by bakery employees.

Sibley's had no interest or control in the management of the Fund. The Fund's trustees were responsible for establishing and funding pension benefit levels, and Sibley's never assumed liability should the Fund be unable to maintain a certain level of benefits. Sibley's contributions were not related to the level of pension benefits promised by the Fund. Its sole obligation

was to pay the Fund a specified amount per hour worked for each covered employee. Pursuant to its collective bargaining agreements, Sibley's, in the ten years prior to 1980, paid the Fund \$445,854.00 on behalf of its bakery employees.

Financial losses attributable to its bakery compelled Sibley's to close the operation. On May 31, 1980, Sibley's closed the bakery and terminated the employment of forty-three bakery workers. Prior to the closing date, Sibley's and the Union negotiated an agreement which fixed Sibley's obligations upon the bakery closing (the "bakery closing agreement"). This agreement required Sibley's to pay its bakery employees for all earned vacation days and all unused personal holidays and to pay an additional sum to each employee as severance pay. Sibley's collective bargaining agreement with the Union required it to make contributions to the Fund with respect to hours for which pay was received by bakery employees under the bakery closing agreement. Sibley's and the Union expressly agreed that the bakery closing agreement set forth all of Sibley's obligations upon the closing of the bakery.

Sibley's completely performed its contractual obligations. It paid its employees for their earned vacation days and unused personal holidays, and it awarded each employee severance pay. On June 3, 1980, Sibley's paid \$3,391.36 to the Fund as its contribution for work performed by bakery employees during the month of May, 1980. On July 10, 1980, Sibley's paid the Fund \$2,829.12 as its contribution based on the vacation pay paid its former employees under the bakery closing agreement. On August 1, 1980, Sibley's paid \$2,803.20 to the Fund as its contribution based on the severance pay paid employees under the bakery closing agreement. Each of these payments represented money paid for, or on account of, services performed prior to June 1, 1980. In a letter dated August 29, 1980, the Fund notified Sibley's that its participation in the Fund had terminated on the date the bakery closed, May 31, 1980.

At the time Sibley's bakery closed, the Employee Retirement Income Security Act ("ERISA") delineated Sibley's potential liability for withdrawal from the Fund. ERISA imposed no withdrawal liability on Sibley's unless the Fund were to terminate within five years of Sibley's withdrawal, 29 U.S.C. §1364(a), and limited Sibley's liability to thirty percent of its net worth. 29 U.S.C. §§1362(b) (2), 1364(b). Under ERISA, the amount of Sibley's potential withdrawal liability would have decreased proportionately each year during the five-year period following withdrawal. 29 U.S.C. §1364(b).

On September 26, 1980, nearly four months after Sibley's closed its bakery, Congress enacted the MPPAA. The MPPAA radically amended ERISA and retroactively imposed withdrawal liability upon any employer who completely or partially withdrew from a multiemployer pension plan on or after April 29, 1980. 29 U.S.C. §§1381 and 1461(e) (2). The MPPAA's retroactive effective date was changed on a number of occasions, and the date ultimately adopted, April 29, 1980, was not fixed in the proposed legislation until June, 1980.

The Fund notified Sibley's for the first time by a letter dated May 11, 1981 that it had computed Sibley's withdrawal liability to be \$315,927.00. Sibley's alleged withdrawal liability is its allocable share of the Fund's unfunded vested benefits as calculated by the Fund's trustees. 29 U.S.C. §§1381 and 1391.

The Fund's "unfunded vested benefit liability" is the difference between the value of its assets and its vested benefit liability. 29 U.S.C. §1393(c). A particular multiemployer fund's unfunded vested benefit liability results from a variety of factors outside the control of employers such as Sibley's including: 1) the separation of the benefit setting function (the sole province of the fund trustees) from the contribution setting function (collective bargaining between unions and employers); 2) poor management of a fund's assets and imprudent benefit increases; 3) ERISA's mandatory modification of the vesting

requirements of many multiemployer pension plans; 4) the granting by unions of past service credits to encourage union membership by enlarging the pension benefits of prospective members; and 5) decreases in the value of a fund's assets due to inflation, interest rate fluctuation and other economic factors. Sibley's and other employers are not responsible for the underfunded status of many pension funds, and the burden which the MPPAA retroactively imposed upon them is harsh and inequitable. Sibley's alleged withdrawal liability is three-quarters of its total contribution to the Fund for the ten years prior to its withdrawal.

The bakery closing agreement was signed almost four months prior to the MPPAA's enactment. At that time Sibley's relied upon existing law which would not have imposed withdrawal liability on it unless the Fund terminated within five years of Sibley's withdrawal. 29 U.S.C. §1364. Sibley's did not and could not have anticipated the additional penalty of withdrawal liability.

Sibley's could not have predicted what the final version of the MPPAA would provide, whether it would be passed, or when it would become effective. In early July, 1980, the House and Senate remained at odds over major portions of the new legislation. The Senate did not approve the original House bill, HR 3904, 96th. Cong., 1st Sess. (1979), until July 29, 1980 (two months after Sibley's closed its bakery) and even then attached certain riders and amendments which proved unacceptable to the House. (126 Cong. Rec. S10169 [daily ed. July 29, 1980]). The House reconsidered, a conference report was issued, and final approval of the conference report occurred September 19, 1980. (126 Cong. Rec. H9180 [daily ed. September 19, 1980]). The MPPAA was enacted on September 26, 1980, more than seventeen months after its introduction. During these seventeen months, the most experienced legislative observer could not have predicted the final substance, form or effective date of the MPPAA.

In June, 1982, Sibley's commenced an action in the United States District Court for the Western District of New York seeking a declaration that the MPPAA was unconstitutional and an injunction restraining the Fund and the Union from taking any action to collect Sibley's alleged withdrawal liability. Sibley's motion for a preliminary injunction was converted to a motion for summary judgment. On March 17, 1983, the Hon. Michael A. Telesca granted Sibley's motion for summary judgment, holding that the retroactive application of the MPPAA violated Sibley's right to due process of law guaranteed by the fifth amendment to the United States Constitution. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F.Supp. 32 (W.D.N.Y. 1983). However, on January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the amendment's constitutionality. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, No. 83-7328 (2d Cir. Jan. 9, 1984).

SUMMARY OF ARGUMENT

The retroactive imposition of withdrawal liability under the MPPAA is not a rational means to accomplish a legitimate governmental purpose. The retroactive application of the MPPAA abrogated Sibley's valuable contract rights and retroactively imposed a substantial economic penalty against Sibley's for a transaction completed well before the MPPAA's enactment.

No public need supported the MPPAA's harsh retroactive penalties. The fear of opportunistic withdrawals (the alleged evil to be averted by retroactive application of the MPPAA) was not well founded. Every employer was bound by a collective bargaining agreement and was required to comply with various notice provisions prior to any withdrawal. No

employer was free to withdraw unilaterally simply to avoid withdrawal liability. In fact, Congress manipulated the MPPAA's retroactive effective date, not to advance any legitimate public purpose, but to exempt certain politically powerful employers who were caught by the originally proposed date from the MPPAA's harsh economic penalties.

The United States Court of Appeals for the Ninth Circuit, applying the *Nachman* analysis, correctly determined that the MPPAA violates the due process clause of the fifth amendment. In negotiating its bakery closing agreement, Sibley's justifiably relied on the then existing provisions of ERISA which imposed withdrawal liability only in the unlikely event that the Fund became insolvent within five years. In contrast, no one reasonably could have relied upon Sibley's to guarantee payment of pension benefits considering its very limited contractual obligation to make contributions per unit of employee labor to the Fund. Although the MPPAA affects an area subject to previous legislation, no employer reasonably could have anticipated the MPPAA's effective date or the extent of the liability that it imposed, because its burdens are entirely different and much more severe than those imposed by ERISA. It is inequitable to impose liability retroactively upon withdrawing employers because only the trustees of underfunded multiemployer plans, who fix benefit levels and invest the fund's assets, can be blamed for a particular fund's poor financial status. Unlike ERISA, the MPPAA is devoid of any provisions designed to limit and moderate the impact of its burdens. Based on a careful consideration of all the relevant factors, this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit declaring the retroactive application of the MPPAA to be unconstitutional.

ARGUMENT

I.

THE MPPAA IS UNCONSTITUTIONAL BECAUSE IT IS NOT A RATIONAL MEANS OF ACCOMPLISHING A LEGITIMATE GOVERNMENTAL PURPOSE.

The MPPAA dramatically modified ERISA and imposed a substantial penalty, equal to a portion of a multiemployer pension fund's total unfunded vested benefit liability, upon employers who withdrew from multiemployer pension plans after April 28, 1980, a date nearly five months prior to the MPPAA's enactment. 29 U.S.C. §1461(e) (2) (A). The imposition of this retroactive penalty violated Sibley's right to due process of law guaranteed by the fifth amendment.

Although Congress' power to enact economic legislation is substantial, it is not without limitation. The due process clause of the fifth amendment prohibits harsh and oppressive retroactive legislation, *Welch v. Henry*, 305 U.S. 134 (1938), and demands that retroactive legislation represent a rational means of accomplishing a legitimate governmental purpose. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

The danger of arbitrary and oppressive legislative action is particularly great where Congress exerts its powers retroactively. Retroactive legislation reaches back to attach new rights and duties to already completed transactions. Congress may act retroactively with an exact knowledge of who will benefit and who will suffer from its acts. *Adams Nursing Home of Williamstown v. Matthews*, 548 F.2d 1077, 1080 (1st Cir. 1977). Retroactive legislation undermines the stability of past transactions, destroys the value of the statutory law as a guide to individual conduct, and contravenes the strong common law tradition that a legislature's function is to declare law for the future. *Adams Nursing Home of Williamstown*, 548 F.2d at 1080; *Leedom v. International Brotherhood of Electrical*

Workers, 278 F.2d 237, 240 (D.C. Cir. 1960). See also Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). Thus, Congress' power to legislate retroactively is considerably less than its power to legislate prospectively. *Turner Elkhorn Mining Co.*, 428 U.S. at 16.

Sibley's experience demonstrates the devastating effect which retroactive legislation such as the MPPAA has on predictability and reliance. Prior to closing its bakery, Sibley's negotiated an agreement with the Union which delineated the full extent of Sibley's responsibilities to its employees and the Union upon the bakery closing. Long after Sibley's had fulfilled its contractual obligations under its bakery closing and collective bargaining agreements, Congress enacted the MPPAA. The MPPAA grossly distorted Sibley's obligations to the Fund, the Union and former bakery employees by superimposing sudden, totally unanticipated and substantial retroactive obligations upon Sibley's, substantially beyond the terms of its agreements with the Union. This Court has found similar retroactive state legislation to be harsh and arbitrary and, therefore, unconstitutional under the contracts clause. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978).

No public need supported the MPPAA's harsh retroactive penalties. There is no merit to the argument that retroactive liability was necessary to prevent employers from withdrawing prior to the MPPAA's enactment merely to avoid liability. "No employer was free to withdraw just because he wanted to. Every employer was bound by a collective-bargaining agreement and bound by various notice provisions required to precede any withdrawal." *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F. Supp. 1234, 1254 (C.D. Calif. 1982), *aff'd*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983). There was no showing that massive employer withdrawals had

occurred or were imminent. In fact, the MPPAA's retroactive effective date was moved from the originally proposed February 27, 1979 to April 29, 1980, not to discourage employer withdrawals, but rather to benefit politically powerful withdrawing employers "who were caught by the [originally proposed] date." 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (remarks of Sen. Javits).

The MPPAA imposed significant burdens much broader than those needed to discourage withdrawals by opportunistic employers. Although the retroactive application of the MPPAA purports to penalize only those opportunistic employers who might have withdrawn from a multiemployer plan simply to avoid withdrawal liability, the amendment also penalizes employers, such as Sibley's and Gray, who were forced to respond to pressing economic circumstances and necessarily and justifiably relied on the existing state of the law. Retroactive imposition of withdrawal liability on employers who withdrew from multiemployer plans for legitimate business purposes was not a rational means to prevent the withdrawal of opportunistic employers. See *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330, 348-49 (1935). The forced payment under the MPPAA of added sums for services already fully compensated is arbitrary, inequitable and fails to fulfill any legitimate governmental purpose in violation of the due process clause of the fifth amendment.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, APPLYING THE NACHMAN ANALYSIS, CORRECTLY DETERMINED THAT THE MPPAA AS RETROACTIVELY APPLIED VIOLATES THE DUE PROCESS CLAUSE.

In reviewing the constitutionality of the MPPAA, the court below applied a test which was uniquely suited for analyzing

retroactive pension legislation — the four part rationality test first articulated by the United States Court of Appeals for the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional question*, 442 U.S. 940 (1979), *aff'd on statutory holding*, 446 U.S. 359 (1980). In *Nachman*, the court examined the constitutionality of the retroactive aspects of ERISA. The court articulated four factors to be considered in evaluating the "rationality" of retroactive federal legislation: (1) the reliance interest of the parties affected; (2) whether the impairment of the private interest occurs in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burden; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burden. *Nachman*, 592 F.2d at 960. Applying the *Nachman* analysis, the court below correctly held that Congress violated the due process clause of the fifth amendment by retroactively imposing substantial economic penalties upon employers who withdrew from multi-employer plans prior to the MPPAA's enactment.

Recently, the Seventh Circuit upheld the retroactive imposition of withdrawal liability under the MPPAA. *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081 (7th Cir. December 19, 1983). In *Peick*, the court declined to examine the constitutionality of the MPPAA under the analysis it previously had articulated in *Nachman* and instead applied the "arbitrary and irrational" standard of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). To determine whether federal legislation is "arbitrary and irrational" requires a comparison of the problem to be solved with the remedy Congress has devised. In comparing the MPPAA's drastic retroactive provisions with the problem it purports to remedy, this Court should consider all relevant factors, including the four factors articulated in *Nachman*. Failure to do so ultimately might preclude meaningful scrutiny of the legislative process — a result prohibited by the due process clause of the fifth amendment.

The *Nachman* factors provide a sound analytical framework for analyzing retroactive legislation under both the contracts clause and the due process clause of the fifth amendment. Several courts of appeals, including the Seventh Circuit in *Peick*, have recognized that the basic principles which have developed under the contract clause are applicable in a due process analysis. *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081, slip op. at 29 (7th Cir. December 19, 1983); *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1024 (6th Cir. 1980). Indeed, the Ninth Circuit has held that "the fifth amendment's due process clause provides essentially the same restraint against federal impairment of the obligation of contracts" as does the contract clause. *Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980). Thus, the factors articulated in *Nachman* provide a well-reasoned and logical basis for examining retroactive federal legislation under the fifth amendment.

In evaluating the "rationality" of the retroactive application of the MPPAA, this Court should consider all relevant factors including the four factors articulated in *Nachman*. The Fourth Circuit, albeit with a different result, has joined the Ninth Circuit in applying the *Nachman* analysis in analyzing the constitutionality of the MPPAA. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983). Indeed, several courts have considered this Court's decision in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) to be a *sub silentio* affirmation of the *Nachman* analysis. See, e.g., *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1024 (1st Cir. 1980). After reviewing the facts surrounding the retroactive imposition of withdrawal liability upon Sibley's, this Court should conclude that the MPPAA is not a rational means to

accomplish a legitimate governmental purpose and, therefore, violates the due process clause of the fifth amendment.

First to be considered are the reliance interests of the affected parties. For financial reasons, Sibley's decided to close its bakery and negotiated an agreement which it believed fixed its entire obligations upon the closing. In negotiating this agreement, Sibley's justifiably relied on the then existing provisions of ERISA which imposed withdrawal liability only in the unlikely event that the Fund became insolvent in the next five years and limited Sibley's withdrawal liability to thirty percent of its net worth. Sibley's honored its commitments under this agreement and, in return, reasonably expected that its rights under the agreement would be honored and protected.

Sibley's cannot be held to have anticipated the new legislation. Congress considered the MPPAA, in a variety of forms, for eighteen months. While the bill was pending it was referred from committee to committee and repeatedly modified. "Outside of the tax area, there is no authority that imposes on anyone the burden of predicting Congressional action." *Shelter Framing Corp.*, 543 F. Supp. at 1249. "Forecasting congressional action (or lack of action) is akin to forecasting the weather or the stock market. There are simply too many unpredictable variables involved." *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F. Supp. 32, 35-36 (W.D.N.Y. 1983), *reversed*, No. 83-7328 (2d Cir. Jan. 9, 1984). Sibley's and other employers could not be expected to suspend all business decisions while Congress contemplated amendments to ERISA.

No employer reasonably could have anticipated the MPPAA's effective date or the extent of the liability it imposed. ERISA's provisions regarding withdrawal liability were benign compared to the harsh penalties ultimately imposed by the MPPAA, and familiarity with ERISA would not have placed an employer on notice of the MPPAA's radically different provisions.

In measuring the reliance interests of a party, this Court should consider what that party might have done if informed that certain legislation was forthcoming. *Welch v. Henry*, 305 U.S. 134 (1938). Sibley's might have continued to operate its bakery, accepting the bakery's financial losses to avoid the substantial penalty imposed by the MPPAA. Knowledge of its potential withdrawal liability could have influenced the terms of the agreement Sibley's negotiated with the Union upon the bakery closing. Sibley's might have avoided liability completely by selling the bakery's assets to a company which participated in the plan and intended to remain in business. 29 U.S.C. §1384. Finally, Sibley's might have withdrawn from the Fund gradually and avoided liability entirely, 29 U.S.C. §1385, or withdrawn partially and lessened its withdrawal liability, 29 U.S.C. §1386. Some of these alternatives were more likely than others, but at the very least, if Sibley's had been notified of its potential liability, it could have made an informed decision.

In contrast, the reliance interests of the Fund and Sibley's former employees are comparatively slight. Given Sibley's very limited contractual obligation to make specified contributions per unit of employee labor to the Fund, no one reasonably could have expected Sibley's to guarantee payment of any pension benefits. Any promises regarding benefit levels upon which the bakery employees might have relied were made by the Fund's trustees, not by Sibley's.

The second element, whether the interests impaired by the retroactive features of the legislation are in an area previously subjected to regulation, is actually another means of analyzing the parties' reliance interests. Previous regulation affects the expectations of the party upon whom the burden of the retroactive legislation falls. "[F]or retroactive legislation in a previously regulated area to be valid, the new and more burdensome legislation must be closely akin in type and scope to the prior legislation." *Shelter Framing Corp.*, 543 F. Supp. at 1251.

The burdens imposed by the MPPAA, however, are entirely different and much more severe than those imposed by ERISA. An employer's withdrawal liability under ERISA was contingent upon the termination of the pension fund within five years of the employer's withdrawal. 29 U.S.C. §1364. In contrast, withdrawal liability under the MPPAA is absolute, because it is triggered by an employer's withdrawal from a multiemployer pension fund, regardless of that fund's solvency. Unlike ERISA, the MPPAA does not limit an employer's liability to thirty percent of its net worth. As the Court of Appeals for the Ninth Circuit has noted, the MPPAA, as retroactively applied, goes "far beyond a clarification or modest modification of ERISA." *Shelter Framing Corp.*, 705 F.2d at 1512. Although the MPPAA affects a previously regulated area, Sibley's and other employers could not have foreseen the imposition of liability of this magnitude, particularly for transactions completed well before the MPPAA's enactment.

Third, the equities tip decidedly in favor of employers such as Sibley's. It is inequitable to require employers to bear the burden of retroactive withdrawal liability. Employers who contribute to multiemployer pension plans are not responsible for the problem which the MPPAA seeks to rectify. Only the trustees of an underfunded multiemployer pension plan can be blamed for that fund's unfunded vested benefits liability. The trustees fix benefit levels, make investments and control the number of employees with vested benefits. It is the trustees to whom the employees should look for relief.

It is particularly inequitable to require Sibley's to bear the burden of retroactive withdrawal liability. Sibley's pre-withdrawal payments to the Fund represented a portion of a total compensation package negotiated at arms-length with the Union. Forced payment of added compensation for services already fully compensated is arbitrary and inequitable. See *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234

(1978). Furthermore, Sibley's withdrawal liability is not measured with reference to contributions made over the years on behalf of its employees. Rather, it is a function of the Fund's unfunded vested benefits liability with respect to the Union's members nationwide.

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court upheld the constitutionality of a federal statute which required coal companies to pay black lung benefits to former employees. The court characterized such payments as "an actual, measurable cost" of doing business. 428 U.S. at 20. The economic burden at issue in *Turner Elkhorn* was minimal when compared to the oppressive and potentially limitless economic liability imposed by the MPPAA on withdrawing employers. Furthermore, withdrawal liability is not an "actual, measurable cost" of doing business but results from the establishment of unrealistic and financially imprudent benefit levels and poor asset management by the trustees and managers of certain multiemployer plans.

As the Court of Appeals for the Ninth Circuit noted, the burden imposed on employers by the MPPAA, "... lacks the justification present" in *Turner Elkhorn*. *Shelter Framing Corp. v. Carpenters Pension Trust For Southern California*, 705 F.2d 1502, 1513 (9th Cir. 1983). The portion of a fund's unfunded vested benefits liability allocated to a withdrawing employer is not limited to the share attributable to its former employees but includes the share of benefits due workers in other states employed by other companies without any relationship to the withdrawing employer. Withdrawal liability cannot be considered a cost of doing business.

Furthermore, the purpose of the black lung statute was compensatory. For decades, the mine operators had "clearly been aware of the danger" to which they were exposing their employees. *Turner Elkhorn Mining Co.*, 428 U.S. at 17. The black lung statute was designed to require all responsible

parties to share in the cost of specific harm they had inflicted in the past, "not simply to increase or supplement a former employee's salary to meet his generalized need for funds." *Turner Elkhorn Mining Co.*, 428 U.S. at 19.

In contrast, the significant withdrawal liability which Sibley's and other similarly situated employers must bear is an unbargained for benefit for union members, unions and multi-employer pension plans. Sibley's and other employers never guaranteed a specific level of pension benefit levels, but rather agreed only to make fixed contributions to particular multi-employer funds. The fund trustees had sole responsibility for investing the contributed funds and setting benefit levels. When Sibley's decided to close its bakery, it negotiated an agreement with the Union which both agreed reflected Sibley's entire liability under its collective bargaining agreement. The MP-PAA abrogated this agreement and retroactively imposed upon Sibley's a substantial economic penalty in violation of the due process clause of the fifth amendment.

In *Borden, Inc. v. United Dairy Workers Pension Program*, 517 F. Supp. 1162 (1981), the United States District Court for the Eastern District of Michigan enjoined trustees of a multi-employer pension plan from increasing benefits in such a manner as to render that plan less than fully funded. 517 F. Supp. at 1166. The court forbade the plan's trustees to "regress the status of the fund when to do so would impose unbargained for liability on the employer plaintiff." *Id.* Similarly, it is inequitable to burden Sibley's and other employers with the responsibility for insuring that former employees of unrelated companies are paid a level of benefits fixed by fund trustees.

Finally, the MPPAA is devoid of any provisions designed to limit and moderate the impact of its burdens, an omission which the Court of Appeals for the Ninth Circuit found to be the most significant distinction between the MPPAA and the original ERISA provisions. *Shelter Framing Corp.*, 705 F.2d at

1514. Under ERISA, an employer incurred withdrawal liability only under limited circumstances and in a limited amount. The PBGC was empowered to waive, modify or defer an employer's liability and offered low cost insurance to employers to cover potential future liability. An employer could avoid withdrawal liability entirely if the fund remained solvent for five years after withdrawal and, in any event, an employer's potential liability was limited to thirty percent of its net worth. Similarly, in *Turner Elkhorn Mining Co.*, this Court noted that the retroactive burden of the black lung statute was lessened considerably because the federal government had assumed "a substantial portion" of the economic burden imposed by the legislation. 428 U.S. at 18.

The MPPAA contains none of these moderating provisions and, in fact, exacerbates the harms by imposing withdrawal liability retroactively. Employers weighing their alternatives after the MPPAA's enactment were able to consider selling or gradually phasing out their operations as described above. However, employers such as Sibley's who ceased covered operations prior to the MPPAA's enactment were unable to make an informed decision regarding these options. Technically, an employer might avoid liability by rejoining the fund. For Sibley's, this option is unrealistic since it closed its bakery in May, 1980, more than three years ago. The opportunity to pay withdrawal liability in monthly installments (with interest) does not moderate the severity of Sibley's alleged withdrawal liability or improve its present financial position. There is, "little, if any, comfort for the employers in these provisions." *Shelter Framing*, 705 F.2d at 1514. The MPPAA is harsh and arbitrary. It is not a rational means to accomplish a legitimate governmental purpose and, therefore, violates the due process clause of the fifth amendment.

CONCLUSION

Retroactive imposition of MPPAA withdrawal liability abrogated Sibley's contractual rights under its bakery closing and collective bargaining agreements with the Union. The MPPAA retroactively imposed a substantial economic penalty upon Sibley's for closing its bakery, a legitimate business decision, and was not a rational means to accomplish a legitimate governmental purpose. Therefore, it is respectfully submitted that this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit holding that the MPPAA as applied retroactively violates the due process clause of the fifth amendment.

Respectively submitted,

**HARRIS, BEACH, WILCOX,
RUBIN and LEVEY**

By: _____
William L. Dorr
*Attorneys for Sibley, Lindsay
& Curr Company*
Two State Street
Rochester, New York 14614
(716) 232-4440

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Nos. 83-245 and 83-291

IN THE
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OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

On Appeal From The United States Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE AND
BRIEF *AMICI CURIAE* OF TRANSPORT MOTOR
EXPRESS, INC., E.W. BOHREN TRANSPORT, INC.,
AND ESSEX GROUP, INC. IN SUPPORT OF APPELLEE
R. A. GRAY & COMPANY

HARRIS WEINSTEIN*
ARVID E. ROACH II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5302

Attorneys for *Amici Curiae*
Transport Motor Express, Inc.,
E.W. Bohren Transport, Inc.,
and Essex Group, Inc.

January 11, 1984

* Counsel of Record

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MOTION OF TRANSPORT MOTOR EXPRESS, INC.,
E. W. BOHREN TRANSPORT, INC.,
AND ESSEX GROUP, INC.

FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN
SUPPORT OF APPELLEE R. A. GRAY & COMPANY

Pursuant to Rule 42(3) of this Court, Transport Motor Express, Inc. ("TMX"), E.W. Bohren Transport, Inc. ("Bohren"), and Essex Group, Inc. ("Essex") hereby move for leave to file as *amici curiae* the brief attached hereto in No. 83-291,

the consent of the parties having been obtained to file said brief in No. 83-245. In support of this motion, *amici* state as follows:

1. This appeal involves a constitutional challenge to retroactive enforcement of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("the MPPAA"). The interest of *amici* in this appeal derives from their status as recipients of a demand for MPPAA withdrawal liability of more than \$8.6 million—many times the amount at stake in the present case—by reason of a pre-enactment business closure, which demand would be invalidated by an affirmance in this case.

2. The withdrawal liability provisions of the MPPAA, codified at 29 U.S.C. §§ 1381-1405, require any employer that permanently ceases, for any reason, to make contributions on behalf of its employees to a collectively-bargained multiemployer pension fund to pay to the fund, as "withdrawal liability," a share of the fund's total "unfunded vested benefits." The MPPAA was signed into law on September 26, 1980, but its withdrawal liability provisions apply retroactively to any withdrawal occurring on or after April 29, 1980. TMX and Bohren terminated their trucking operations on April 25-26, 1980, but continued to employ a small number of Teamster members for a short period after April 29, 1980. This is asserted by the Central States, Southeast and Southwest Areas Pension Fund to provide the basis for assessing withdrawal liability of more than \$8.6 million, almost three times the combined net worth of TMX and Bohren. The Central States Fund asserts the right to collect the remaining amount from Essex, the corporate parent of TMX and Bohren.

3. *Amici* brought suit on August 10, 1981 in the United States District Court for the Northern District of Illinois, seeking to have the withdrawal liability provisions of the MPPAA declared unconstitutional as applied to them. *Transport Motor Express, Inc. v. Central States Fund*, 4 Empl. Ben. Cases (BNA) 1566 (N.D. Ill.), *remanded*, 4 Empl. Ben. Cases (BNA) 2502 (7th Cir. 1983). The record in that litigation shows how the MPPAA's withdrawal liability provisions are

actually being applied—including the confiscatory impact of the asserted liability, the multiemployer fund's self-interested use of the statute's one-sided procedures, and the fund's admitted lack of need for any withdrawal liability monies.

4. The district court in *TMX* entered summary judgment in favor of the Central States Fund. That decision was recently remanded by the Seventh Circuit, with instructions that the district court consider certain non-constitutional issues prior to decision of the constitutional questions.

5. The brief tendered by *amici* in support of the position of appellee R.A. Gray & Company first summarizes the facts of the *TMX* case—facts we believe to be representative of those confronting many employers subjected to retroactive enforcement of MPPAA withdrawal liability. The brief then argues that retroactive imposition of withdrawal liability on closed transactions is barred by this Court's decisions under the Due Process and Just Compensation Clauses of the Fifth Amendment. The tendered brief further argues that the retroactive withdrawal liability provisions of the MPPAA are also unconstitutional under the four-factor test articulated by the Seventh Circuit in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir.), *cert. denied on constitutional holding*, 442 U.S. 940 (1979), *aff'd on statutory holding*, 446 U.S. 359 (1980).

6. *Amici* have requested the parties to consent to filing of the tendered brief. Consents have been provided by the appellee in both cases, R.A. Gray & Company, and by the appellant in No. 83-245, the Pension Benefit Guaranty Corporation, copies of which are being filed with the Clerk of the Court. The appellant in No. 83-291, Oregon-Washington Carpenters-Employers Pension Trust Fund, has not responded to *amici's* request for consent. This motion is being submitted to permit consideration of the tendered brief in both actions.

7. *Amici* filed a similar brief as *amici curiae* in this case in the court below. Leave to file that brief was granted by the Ninth Circuit.

WHEREFORE, it is requested that this motion be granted.

Respectfully submitted,

HARRIS WEINSTEIN*

ARVID E. ROACH II

Covington & Burling

1201 Pennsylvania Avenue, N.W.

P.O. Box 7566

Washington, D.C. 20044

(202) 662-5302

Attorneys for *Amici Curiae*

Transport Motor Express, Inc.,

E.W. Bohren Transport, Inc.,

and Essex Group, Inc.

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HARRIS WEINSTEIN*
ARVID E. ROACH II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
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(202) 662-5302

Attorneys for *Amici Curiae*
Transport Motor Express, Inc.,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-245 and 83-291

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal From The United States Court of Appeals
For the Ninth Circuit

**BRIEF *AMICI CURIAE* OF TRANSPORT MOTOR
EXPRESS, INC., E.W. BOHREN TRANSPORT, INC.,
AND ESSEX GROUP, INC. IN SUPPORT OF APPELLEE
R.A. GRAY & COMPANY**

This brief *amici curiae* in support of appellee R.A. Gray & Company ("Gray") is presented by Transport Motor Express, Inc. ("TMX"), E.W. Bohren Transport, Inc. ("Bohren"), and Essex Group, Inc. ("Essex") to assist the Court in considering the constitutionality of the retroactive application of the withdrawal liability provisions of the Multiemployer Pension

Plan Amendments Act of 1980 ("the MPPAA")¹ to employers that withdrew from multiemployer pension plans before the enactment of the statute on September 26, 1980 but on or after its retroactive effective date of April 29, 1980. *Amici* will show that the decision below² should be affirmed.

THE INTEREST OF *AMICI*

Amici are plaintiffs in a suit challenging the constitutionality of an effort to collect over \$8.6 million from them by retroactive application of the withdrawal liability provisions of the MPPAA.³ TMX and its subsidiary Bohren were interstate motor carriers until April 25, 1980, when they notified their customers and others of the closure of their business as a result of severe losses. On April 25 and 26, 1980, most of their employees were dismissed, but a few remained on a temporary basis past April 28.

When they were active businesses, TMX and Bohren contributed to the Central States, Southeast and Southwest Areas Pension Fund at a fixed rate for each week worked by each covered employee. The contribution rate was fixed by collective bargaining agreements that TMX and Bohren had entered into with the Teamster union locals that represented their employees. The labor contracts, and therefore the obligation of TMX and Bohren to contribute to the Central States Fund, terminated with the end of the TMX and Bohren businesses. TMX and Bohren had no other obligations to the Fund, and did not promise their employees pensions in any amount.

¹ Pub. L. No. 96-364, 94 Stat. 1208 (1980). The withdrawal liability provisions of the MPPAA added Sections 4201-25 to the Employee Retirement Income Security Act of 1974 ("ERISA"), which are codified at 29 U.S.C. §§ 1381-1405.

² *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502 (9th Cir. 1983), *aff'd*, 543 F. Supp. 1234 (C.D. Cal. 1982).

³ *Transport Motor Express, Inc. v. Central States Fund*, 4 Empl. Ben. Cases (BNA) 1566 (N.D. Ill. 1983), *remanded*, 4 Empl. Ben. Cases (BNA) 2502 (7th Cir. 1983).

In mid-1981, the Central States Fund demanded from TMX, Bohren, and TMX's parent, Essex,⁴ immediate payment of withdrawal liability in a lump sum of over \$8.6 million, or, in the alternative, payment of more than \$11.2 million in monthly installments of \$140,000 for a period of about 6½ years. The \$8.6 million claimed is almost three times the net worth of TMX and Bohren. The monthly installments exceed the highest rate at which TMX and Bohren contributed to the Fund as going business concerns.

The claim against *amici* represents a part of the Central States Fund's unfunded vested benefits ("UVB"), as calculated *ex parte* by the Fund.⁵ UVB is the amount by which the estimated present value of a fund's currently-vested pension benefits exceeds the value of the fund's current assets. A fund's UVB is not a fixed or readily ascertainable amount. Its determination requires a number of "actuarial assumptions," which can and do vary over a wide range. Much of the data to which these assumptions are applied must be estimated because employee records of multiemployer funds generally are incomplete.⁶

The record in the *TMX* case shows that the Fund's actuary arrived at, and the Fund trustees adopted, three radically different figures for UVB over a period of four months—first \$2.047 billion, then \$4.108 billion, and finally \$3.576 billion. In changing from the first to the second amounts, the Fund and its actuary substantially enlarged UVB by discarding data samples obtained from employees and local unions that had previously been relied upon in making estimates of the Fund's liabilities,

⁴ Essex is, in turn, a subsidiary of United Technologies Corporation.

⁵ The Fund's actuarial assumptions and other determinations can be challenged only through compulsory arbitration, where those assumptions and determinations are subject to statutory presumptions of correctness. ERISA § 4221(a)(1), (3), 29 U.S.C. § 1401(a)(1), (3). On judicial review, arbitral findings are shielded by additional presumptions of correctness. *Id.* § 4221(c), 29 U.S.C. § 1401(c).

⁶ In these respects the Central States Fund is typical of multiemployer funds.

and substituting selective extrapolations from other data.⁷ The subsequent downward adjustment of UVB to \$3.6 billion resulted primarily from a change in the interest rate assumption used in calculating present values from 6½ percent to a ten-year sliding scale equivalent to a flat 7½ percent rate. The Fund's actuary acknowledged that a still higher assumption, such as 9 percent, would have been reasonable. A 9 percent rate would have reduced UVB by a further \$1 billion.

SUMMARY OF ARGUMENT

Retroactive MPPAA withdrawal liability rewrites carefully-negotiated labor agreements after they have been fully performed, and imposes large liabilities on one party. This sort of nakedly retroactive legislation is condemned by every pertinent line of Supreme Court authority.

Under the Due Process Clause, retroactive laws must overcome a heavy burden of justification. This is because retroactivity denies a citizen the right to know the legal consequences of his conduct, and thereby strikes at the heart of the rule of law. This Court has repeatedly disapproved retroactive lawmaking, particularly in the area of pensions, where protecting reliance interests is particularly vital. *See, e.g., Arizona Governing Committee v. Norris*, 103 S. Ct. 3492, 3510 (1983) (Opinion of Powell, J.); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978); *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978); *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935).

Retroactive imposition of MPPAA withdrawal liability lacks the justification required to overcome Due Process restrictions on retroactive legislation. This overwhelming and

⁷ Officials of the Fund testified that the initial jump from \$2 billion to \$4 billion resulted from an increase in "noncontributory past service credits" attributed to employee participants in the Fund. Such credits reflect periods for which no contributions were made on the employee's behalf, but which can be counted in pension determinations. The Fund's records of such creditable service are incomplete.

unanticipated liability is not necessary to satisfy any legitimate expectations of employees, who looked to their multiemployer pension funds—not the contributing employers—for their pensions. As employees were well aware, multiemployer funds were specifically designed to accommodate periodic employer withdrawals. The employers' sole contractual duty was to pay the agreed-upon contributions. Moreover, Congress effectively acknowledged that there was no need for retroactive enforcement of withdrawal liability when it changed the effective date of the MPPAA from February 1979 to April 1980 to accommodate politically-influential employers. Nothing in the legislative history of the MPPAA demonstrates any public need for the five months of retroactivity that were retained.

Retroactive MPPAA withdrawal liability also violates basic Contract Clause principles that illuminate the application of the Due Process Clause to Congressional legislation. As in *Allied Structural Steel, supra*, the effect of retroactive MPPAA withdrawal liability is to alter contractual duties with no adequate public justification. In contrast, the black lung benefits law upheld in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), while in some degree retrospective, was specifically compensatory, and included substantial grace periods and significant governmental sharing in the costs it imposed.

The Just Compensation Clause of the Fifth Amendment is also controverted by retroactive withdrawal liability, which seizes the entire net worth of employers without compensation, in order to confer undeserved and unbargained-for windfalls on multiemployer pension funds. This unprecedented retroactive destruction of reasonable, investment-backed expectations constitutes an unconstitutional taking.

The four-factor analytical framework of *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir.), cert. denied on constitutional holding, 442 U.S. 940 (1979), aff'd on statutory holding, 446 U.S. 359 (1980), provides further confirmation of the unconstitutionality of the retroactive withdrawal liability provisions of the MPPAA. With respect to *reliance interests*, this retroactive statute destroys employers' justified reliance on completed

arm's-length transactions while furthering no legitimate reliance interests of employees or multiemployer funds. The *prior regulation* of multiemployer pension funds in no way presaged retroactive withdrawal liability. The relevant *equities* also weigh heavily against the statute, for employers had no responsibility for the creation of multiemployer funds' unfunded vested benefits, and employers withdrawing prior to the enactment of the MPPAA are unjustly singled out to bear an even heavier burden than other employers. Finally, MPPAA withdrawal liability has no meaningful *moderating features*, particularly as applied to pre-enactment withdrawals.

ARGUMENT

Retroactive imposition of MPPAA withdrawal liability reaches backward in time to reopen closed, arm's-length transactions, rewriting fully-performed collective bargaining agreements to benefit one party entirely at the expense of the other. Under the governing labor contracts—which were well understood by unions, employers and employees alike—the sole obligation of employers to multiemployer pension funds was to make agreed-upon contributions to the funds. Pension levels, fund investment practices and other fund policies were determined exclusively by trustees bound to act solely in the interests of plan beneficiaries. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). Nor did any employer have a duty to continue participating in a fund indefinitely; rather, the very purpose of multiemployer funds was to provide a mechanism for employees to obtain pension benefits in industries characterized by high levels of turnover among both employers and employees. Multiemployer funds were established specifically to permit employees to accumulate pension rights as they moved from employer to employer within such industries. PBGC, *MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214*, at 20-21 (1978).

Prior to enactment of the MPPAA in September 1980, a withdrawal from a multiemployer fund caused no liability. No employer was liable for any amount beyond its contractually required contributions unless the fund entirely terminated. In

that event, part ⁸ of the fund's UVB was paid by all employers involved with the fund, including those who had withdrawn during the prior five years. ERISA § 4064, 29 U.S.C. § 1364 (1976).⁹ The MPPAA changed the law to create a new liability by imposing the withdrawal liability that gives rise to this case. *Id.* § 4201(a), 29 U.S.C. § 1381(a). This new liability was imposed retroactively on any employer who had withdrawn ¹⁰ on or after April 29, 1980, a date nearly five months before the MPPAA was signed into law on September 26, 1980. *Id.* § 4402(e)(2)(A), 29 U.S.C. § 1461(e)(2)(A).

The effect of the MPPAA is to impose months after the fact new and substantial liabilities on a fully-performed closed transaction. Retroactive liability of this character cannot be reconciled with this Court's decisions holding that the Due Process and Just Compensation Clauses of the Fifth Amendment restrict the enactment of retroactive legislation. At the heart of the arguments of appellants is the notion that so long as Congress acts "rationally," it is as free to legislate retroactively as it is to legislate prospectively. *E.g.*, PBGC Brief, pp. 19, 22. But in fact, it is clear that retroactive legislation must satisfy a higher burden of fairness and demonstrated public need than prospective legislation. The claims of appellants notwithstanding, it is firmly established that the Due Process Clause forbids "harsh and oppressive" retroactive legislation.¹¹

⁸ Even if the fund did terminate, each employer's liability was limited to a share of part (not all) of the multiemployer fund's UVB, up to a maximum of 30 percent of the employer's net worth. ERISA §§ 4022(b), 4064, 29 U.S.C. §§ 1322(b), 1364 (1976).

⁹ The PBGC determined the amount of the liability, and employers were liable only for such vested benefits as the PBGC elected to guarantee. *Id.* § 4082(c), 29 U.S.C. § 1381(c) (1976). A "substantial employer" (generally, one that had made 10 percent or more of the contributions to a fund) was required on withdrawal to post security with the PBGC. However, this security was returned if the multiemployer fund did not terminate within five years. *Id.* § 4063, 29 U.S.C. § 1363 (1976).

¹⁰ An employer is deemed to have withdrawn completely when the employer (1) permanently ceases to have an obligation to contribute to the plan, or (2) permanently ceases all covered operations under the plan. *Id.* § 4203(a), 29 U.S.C. § 1383(a).

¹¹ *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).

The same clause also precludes Congress from radically impairing preexisting contracts much as the Contract Clause of Article I, § 10 of the Constitution limits state action.¹² In addition, the Just Compensation Clause forbids legislation that, like the MPPAA, takes one person's property for the benefit of another without compensation,¹³ especially where the taking is retroactive.¹⁴

I.

RETROACTIVE WITHDRAWAL LIABILITY VIOLATES RESTRAINTS ON RETROACTIVE LAWMAKING IMPOSED BY THE DUE PROCESS CLAUSE

This Court last had occasion to address a retroactive statute comparable to the MPPAA in 1935. In *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935), all nine justices condemned a provision of the Railroad Retirement Act of 1934 that retroactively required railroads to pay pensions to individuals whose employment had ended prior to enactment. *See id.* at 348-49 (Opinion of the Court); *id.* at 389 (Opinion of Hughes, C.J.). Chief Justice Hughes, joined by Justices Brandeis, Stone and Cardozo, had no doubt that such retroactivity was "arbitrary and beyond the power of Congress," *id.*, notwithstanding their dissent from the portion of the Court's decision that overturned the prospective aspects of the very same pension legislation.

This distinction between retroactive and prospective legislation runs throughout the constitutional jurisprudence of the Court. "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." *Usery v. Turner*

¹² *See, e.g., Allied Structural Steel, supra*, 438 U.S. at 241 & n.12 (citing Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 890-91 (1944)).

¹³ *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

¹⁴ *See, e.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

Elkhorn Mining Co., 428 U.S. 1, 16 (1976). The reasons for this principle are basic to the rule of law. The essence of our legal system is that citizens are entitled to know the consequences of their acts. If retroactive lawmaking is constitutional, each person proceeds at the peril that a later-enacted statute will impose an important new burden on a past act. Absent a strong presumption against the validity of retroactive legislation, the "government of laws" described in *Marbury v. Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), is undermined. It is not enough to argue, as appellants do (PBGC Brief, pp. 35-40; Pension Fund Brief, pp. 9-16), that the pendency of proposed legislation provides all the notice the Constitution requires. Even if it were possible to stay abreast of all proposed legislation, and to remain attuned day-by-day to the changing provisions of each proposal, the Constitution cannot possibly require individuals to guess at the final outcome of political controversies before determining a course of conduct.

Here, moreover, it was not Congressional action alone that an employer would have had to predict to account for the potential consequences of retroactive lawmaking. To assess the consequences of proposed action, an employer would have had to divine more than the contents of the MPPAA—it would also have had to gain access to the multiemployer fund's records and actuarial analyses to determine how much, if any, liability might result in the event of a withdrawal. Prior to enactment, even an omniscient employer that accurately predicted the passage, substance and effective date of the MPPAA would have been helpless in any effort to gauge the effect of withdrawing from a multiemployer fund, because the vital facts were beyond reach.¹⁵

The right to know the legal consequences of one's actions—to be confident that one is not subject to the risk of new liabilities by reason of a fully-closed transaction—is a core

¹⁵ The law, as adopted, requires multiemployer plans to provide essential information to employers contemplating withdrawal. ERISA § 4221(e), 29 U.S.C. § 1401(e). No such right of access to information existed prior to adoption of the MPPAA.

value of our Constitution. It is expressly recognized as to criminal legislation in the Ex Post Facto Clause, and the same principle applies to civil legislation by way of the Due Process and Contract Clauses. This Court has accordingly made clear that the Due Process Clause forbids "harsh and oppressive" retroactive legislation. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).¹⁶

Legislation that reaches backward in time to attach new liabilities to prior transactions has rarely been sustained. The Court's decision in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922), is a good example. A boat using a canal was compelled to pay tolls higher than the law allowed. A statute passed two years later purported to legalize the tolls retroactively. Justice Holmes, for a unanimous Court, declared that both the Due Process Clause and the Contract Clause forbade the retroactive law.¹⁷

Only last Term, this Court twice confirmed that retroactive changes in law are strongly disfavored. In *United States v.*

¹⁶ See generally 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439-40, 448-49, 617 (rev. ed. 1937); THE FEDERALIST, No. 44 (Madison), at 301 (J. Cooke ed. 1961) (Bill of Attainder, Ex Post Facto and Contract Clauses constitute a "constitutional bulwark in favor of personal security and private rights"); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 10 MINN. L. REV. 775, 790-97 (1936).

¹⁷ A narrow exception to the constitutional proscription of retroactive lawmaking exists for income tax legislation, where limited retroactivity—generally within a single tax year—has been permitted. But this is permitted because income taxes are simply "a way of apportioning the cost of government" to all. *Welch v. Henry*, 305 U.S. 134, 146 (1938). Moreover, as the district court below recognized, taxes are "sui generis because of the taxable-year concept." 543 F. Supp. at 1252; see also *Peick v. PBGC*, 539 F. Supp. 1025, 1054 (N.D. Ill. 1982), *aff'd*, 4 Empl. Ben. Cases (BNA) 2473 (7th Cir. 1983). It is striking that even in the tax area, the Court has held that due process will not permit retroactive legislation where the tax imposed differs significantly from prior taxes. See, e.g., *Helvering v. Helmholz*, 296 U.S. 93 (1935); *Coolidge v. Long*, 282 U.S. 582 (1931); *Untermeyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); *Nichols v. Coolidge*, 274 U.S. 531 (1927); *Levy v. Wardell*, 258 U.S. 542 (1922).

Security Industrial Bank, 103 S. Ct. 407 (1982), the Court held that retroactive application of a lien avoidance provision of the 1978 Bankruptcy Reform Act would pose "substantial" constitutional problems, and therefore resolved statutory ambiguities in favor of applying the provision prospectively only. *Id.* at 410-12. The Court emphasized that the retroactive taking of creditors' property could not be justified—as appellants attempt to justify retroactive MPPAA withdrawal liability—merely on the ground that it was a "rational" legislative action. *Id.* at 410. And in the final decision of the Term, *Arizona Governing Committee v. Norris*, 103 S. Ct. 3492 (1983), the Court gave solely prospective effect to its ruling that Title VII of the Civil Rights Act of 1964 requires pension benefit levels to be calculated without regard to the gender of the beneficiary, despite the principle that judicial decisions, unlike statutes, generally have retroactive effect. *Id.* at 3509-10. The Court's reason—that it would have been unjust to upset employers' reliance in structuring their pension plans on a reasonable interpretation of then-existing law—is identical to the principle that governs this case.¹⁸ Many other decisions of this Court confirm the grave constitutional problems posed by retroactive legislation.¹⁹

Indeed, this Court has on every possible occasion held that the rules governing pension arrangements should not be changed retroactively. This has been so whether the retroactive

¹⁸ See also *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978) ("the rules that apply to [pension and insurance] funds should not be applied retroactively unless the legislature has plainly commanded that result"). Indeed, the Court in *Arizona Governing Committee* held that employers had not received sufficient notice of the Court's construction of Title VII to justify retroactive application despite the fact that "all but one of the lower courts that [had] considered the question" over a period of five years had adopted that construction. See 103 S. Ct. at 3497 (opinion of Marshall, J.). The present case involves a much clearer denial of notice of a change in the law.

¹⁹ See, e.g., *Greene v. United States*, 376 U.S. 149 (1964); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936); *Danzer Co. v. Gulf R.R.*, 268 U.S. 633 (1925); *Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913); *Ettor v. City of Tacoma*, 228 U.S. 148 (1913); *Winfree v. Northern Pacific Ry.*, 227 U.S. 296 (1913).

change is found in an Act of Congress, as in *Alton Railroad, supra*; in a state statute, as in *Allied Structural Steel, supra*; or in a court decree intended to right a violation of Title VII of the Civil Rights Act of 1964, as in *Arizona Governing Committee, supra*. The retroactive imposition of withdrawal liability under the MPPAA is no less harsh and oppressive than the changes in law at issue in those cases. Retroactive withdrawal liability cannot be squared with basic constitutional precepts and cannot be justified under any of this Court's prior decisions. The immense inequity of imposing this liability retroactively is illustrated in case after case. For example, the claim in issue in *TMX*, over \$8.6 million, is nearly three times the total payments TMX and Bohren made to the Central States Fund during the years 1977 to 1979, and far exceeds the value of the two companies' assets.

Moreover, retroactive imposition of withdrawal liability is not needed to preserve equities attached to any other person's position. Multiemployer funds had no right or legitimate expectation to receive MPPAA withdrawal liability from employers that withdrew prior to enactment. The statute, moreover, compels payment to funds that face no risk of financial difficulty and have no need for withdrawal liability payments.²⁰ Retroactive withdrawal liability is an unanticipated windfall to the fund's beneficiaries and its remaining employer contributors. If the payments are used to increase benefits, employees will receive a windfall they had no fair reason to anticipate; if they are used to reduce contributions by employers remaining in the fund, then it is those employers that receive the unwarranted windfall.

One would expect the most compelling public need to be shown in support of so large an invasion of past acts and closed transactions. Yet Congress implicitly conceded that no public need supports the retroactive imposition of withdrawal liability. This occurred when Congress shifted the retroactive effective

²⁰ The Central States Fund's actuary has stated under oath that the Fund is financially sound, that employer withdrawals do not harm the Fund, and that the probability that the enormous Central States Fund will ever face insolvency even if it never collects a penny of withdrawal liability is "essentially zero." Affidavit of Daniel F. McGinn, Feb. 11, 1981, ¶ 20, *Robbins v. PBGC*, No. 79-C-2601 (N.D. Ill.) (emphasis in original).

date of MPPAA withdrawal liability from February 27, 1979, as originally proposed, to the date finally adopted, April 29, 1980, in order to benefit politically powerful withdrawing employers. As a principal sponsor of the statute acknowledged, "the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date." 126 CONG. REC. 20179 (1980) (remarks of Sen. Javits); *see also id.* at 20235 (remarks of Sen. Matsunaga) ("efforts of powerful lobbyists"). There is not a word in the legislative history of the MPPAA that establishes any public need for the five months of retroactivity that were retained.²¹ It is apparent that the five-month retroactivity period finally settled upon by Congress was of no social significance, and that those employers arbitrarily caught by that period of retroactivity simply lacked the political muscle of others who would have been caught by the earlier proposed retroactivity date that Congress abandoned.²² That lack of political power cannot possibly justify the exaction of millions of dollars of retroactively-imposed liability. The Due Process Clause forbids application of the MPPAA to those who had ended their contractual relations with multiemployer plans prior to enactment of the MPPAA.

²¹ This absence of evidence in the legislative record is not surprising, as it is inherent in multiemployer plans that employers have little control over the timing of a withdrawal. Participation in such plans is through collective bargaining agreements. *See* Labor-Management Relations Act § 302(c), 29 U.S.C. § 186(c). An employer can withdraw only if the employees decertify a union, if a withdrawal is agreed to with the union, or if the business closes.

²² The Congressional committee reports on the MPPAA offer no justification for retroactivity. *See* H.R. REP. NO. 96-896, Pt. I, 96th Cong., 2d Sess. 100, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2918, 2968; H.R. REP. NO. 96-689, Pt. II, 96th Cong., 2d Sess. 43, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2992, 3032. The only suggestion in the extensive debates on the statute of any ground for retroactivity is a comment by Senator Matsunaga, speaking of the originally-proposed effective date of February 27, 1979, that "opportunistic employers" might have withdrawn while Congress was considering the bill unless there had been a threat of retroactive enforcement. 126 CONG. REC. 20234 (1980). There is not a shred of evidence anywhere in the legislative history that any such "opportunistic employers" actually existed, and Senator Matsunaga acknowledged that "powerful lobbyists" representing withdrawn employers caught by the February 1979 date dissuaded Congress from adopting that date. *Id.* at 20235; *see also id.* at 20179 (remarks of Sen. Javits). No one sought to explain why it was decided to retain five months of retroactivity.

II.

**THE RETROACTIVE ALTERATION OF
FULLY-PERFORMED CONTRACTS BY THE
MPPAA VIOLATES CONTRACT CLAUSE
PRINCIPLES IMPLICIT IN THE
DUE PROCESS CLAUSE**

The Constitution is infringed by a statute that alters fully-performed contracts as significantly as does the MPPAA.²³ The reason is that

“contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.”

Allied Structural Steel, supra, 438 U.S. at 245. Just as state impairments of contracts are forbidden by the Contract Clause, Congressional enactments that retroactively destroy settled contractual expectations run afoul of the Due Process Clause of the Fifth Amendment, which prohibits arbitrary infringement of liberty and property interests by the federal government.²⁴

²³ See, e.g., *United States Trust, supra*; *Forbes Pioneer Boat Line, supra*; *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 61 (1935) (Cardozo, J.) (statute undermining bondholders' rights in property securing their bonds) (cited in *Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2306 (1983)).

²⁴ This Court has held that fundamental constitutional limits on state action apply to federal action via the Fifth Amendment's Due Process Clause. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Whatever may be the full extent to which Contract Clause principles apply to federal action, Congress must at least be subject to such principles where, as here, a wholly retroactive statute reopens and radically rewrites fully-performed contractual arrangements. See *Thorpe v. Housing Authority*, 393 U.S. 268, 278-79 & n.31 (1969); *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 388 (1953); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 451-52 (1937); *Perry v. United States*, 294 U.S. 330, 353-54 (1935); *Lynch v. United States*, 292 U.S. 571 (1934); *Shelter Framing, supra*, 705 F.2d at 1513 n.12; *Fornaris v. Ridge Tool Co.*, 423 F.2d 563, 566-67 (1st Cir.), *rev'd on other grounds*, 400 U.S. 41 (1970).

In *Allied Structural Steel*, the Court applied the Contract Clause to strike down a Minnesota pension law that applied only prospectively, but altered the obligations of pre-existing labor agreements. The statute required any employer of 100 or more employees that terminated a pension plan or closed a Minnesota office to provide full pensions for all employees who had worked for the company for at least ten years, even if the employees' pensions had not vested under applicable contracts. The Court held that this "severe disruption of contractual expectations," inflicted "in an area where the element of reliance was vital—the funding of a pension plan," violated the Contract Clause. *Id.* at 246-47.

As the Court recently noted in discussing *Allied Structural Steel*, the Minnesota pension statute struck down there could not be justified as a regulatory measure with a mere incidental effect on contracts, because "its sole effect was to alter contractual duties." *Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2306 (1983). The same is true of retroactive MPPAA withdrawal liability. Contracts alone gave rise to an employer's obligation to contribute to multiemployer pension funds. The MPPAA imposes retroactive liability only upon those who by contract agreed to make such contributions, and does so by substantially enlarging the obligations of one party to a complex and carefully-bargained employment agreement.

In *Allied Structural Steel*, the Court contrasted the action of the Minnesota legislature to that of Congress, which had included several statutory grace periods in the single-employer pension plan provisions of ERISA in 1974. 438 U.S. at 247, 249 n.23; see ERISA §§ 211(b)(2), 306(b), 514(a), 29 U.S.C. §§ 1061(b)(2), 1086(b), 1144(a). Cf. *Turner Elkhorn*, *supra*, 428 U.S. at 8-10 (delayed effectiveness of black-lung benefits statute). In enacting the MPPAA, Congress did not show similar constitutional discipline. In contrast to the single-employer provisions of ERISA, the withdrawal liability provisions of the MPPAA afforded no grace period during which employers could withdraw from multiemployer funds without incurring heavy liabilities. This omission had a drastic effect on

employers, who, as the Ninth Circuit held (705 F.2d at 1511-12), could and would have acted to avoid liability had they been able to do so.²⁵

Gray and TMX bargained with their employees in the good faith expectation that they faced no prospect of added liability if business circumstances thereafter required them to discontinue contributions to their multiemployer funds. Many months after full performance of their contractual obligations, Congress sought to impose large retroactive liabilities as an unanticipated incident of their fully-performed contracts. This is an even more severe legislative incursion into contractual rights than the one condemned in *Allied Structural Steel*.

The Court's holdings in *Alton Railroad* and *Allied Structural Steel* are usefully contrasted with the decision in *Turner Elkhorn, supra*. In the latter case, the Court sustained a statute requiring mine operators to bear some of the cost of compensating their former employees for black lung disease resulting from unhealthy mining conditions. The statute worked retrospectively in the sense that it compensated employees whose disease antedated enactment of the law, but it was not purely retroactive because liability was imposed only on employers who remained in the industry for a period of time after enactment. 428 U.S. at 8-10. For a substantial period following enactment, companies were free to leave the industry and avoid liability altogether. *See id.* A large portion of the total cost of providing health benefits was borne by the government, including the total cost of all claims filed in the first 3½ years following enactment. The employers paid part of the cost of claims filed in the next six months and were made fully liable only for claims filed more than four years after the statute was enacted. *Id.* Moreover, the purpose of the statute was purely compensatory. Each company was required to pay certain claims of its own former employees if their disease arose from employment with the particular company. For decades,

²⁵ See *Turner Elkhorn, supra*, 428 U.S. at 17 n.16 (noting importance of whether "a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided liability by altering his conduct").

the mine operators had "clearly been aware of the danger" to which they were exposing their employees. *Id.* at 17. The Court expressly distinguished the black lung statute from the retroactive pension scheme in *Alton Railroad*:

"The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employees labored—to allocate to the mine operator an actual, measurable cost of his business."

Id. at 19.

Retroactive imposition of MPPAA withdrawal liability does not compensate for any harm done by an employer to a multiemployer fund or to the employer's former employees.²⁶ All concerned understood that the only "actual, measurable cost" (428 U.S. at 19) an employer incurred with respect to a multiemployer fund was the cost of agreed-upon contributions. Moreover, the exaction of withdrawal liabilities has no necessary impact on a pension fund's UVB—the trustees are entirely free to increase pension benefits at will, thereby leaving UVB constant or higher no matter how many millions of dollars in withdrawal liability are collected.²⁷ Nor does the MPPAA fulfill any legitimate expectation of employees. Rather, imposing withdrawal liability on pre-enactment withdrawals undoes completed arm's-length bargains that were fully understood by union, employer and employees alike. A key term of those bargains was that the employers were responsible only for fixed contributions to the multiemployer fund. The employers promised no pension benefits.²⁸ It was the province of the trustees of the multiemployer fund to determine what pension amounts could be supported by the promised contributions. Had the employers contracted to provide pensions in specified

²⁶ An employer must pay a share of a multiemployer fund's UVB as withdrawal liability even if *none* of its own former employees is entitled to a penny in vested pension benefits.

²⁷ See, e.g., *Peick, supra*, 539 F. Supp. at 1047 n. 45.

²⁸ The district court below so held. 543 F. Supp. at 1250.

amounts regardless of cost, the other terms of their collective bargaining agreements would undoubtedly have been significantly different—employers would have been able to bargain for lower wages and other compensation, and, if they had participated in a multiemployer fund at all, they would surely have sought control over benefit levels, investment policies and other operations of the fund. To redraw those bargains after they have been fully performed, in order to benefit one side at great cost to the other, is retroactive alteration of legitimate contractual rights and expectations in its most naked form.

These differences between the Black Lung Act and the MPPAA display the fallacy of appellants' argument that the outcome of this case must be the same as in *Turner Elkhorn*. As the Ninth Circuit stated in finding retroactive imposition of withdrawal liability to be unconstitutional: "This burden on the employers lacks the justification present in *Turner Elkhorn Mining*." 705 F.2d at 1513.

Retroactive MPPAA withdrawal liability clearly cannot survive scrutiny under the principles this Court has developed in applying the Contract Clause, which serve in this case to illuminate the application of the Due Process Clause to federal legislation. No legal system based on the principled application of a rule of law can countenance such legislation, and it ought not to survive scrutiny under the Due Process Clause of the Fifth Amendment.

III.

THE MPPAA'S RETROACTIVE WITHDRAWAL LIABILITY PROVISIONS EFFECT AN UNCONSTITUTIONAL TAKING

Imposing liability on pre-enactment withdrawals separately violates the Just Compensation Clause of the Fifth Amendment, which bars Congress from taking property without compensation from one person simply to benefit another. *See, e.g., United States v. Security Industrial Bank*, 103 S. Ct. 407, 410-12 (1982); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-80 (1937); *Louisville Joint Stock Land Bank v.*

Radford, 295 U.S. 555, 602 (1935); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).²⁹

The key factors in judging whether an unconstitutional taking has occurred were summarized in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). They are: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* at 175.

The "economic impact" of MPPAA withdrawal liability is severe. It does not merely regulate the use or enjoyment of property. It destroys vested contract rights, see *Lynch v. United States*, 292 U.S. 571, 579 (1934), and takes large amounts of money to subsidize or increase pensions the employer did not establish. As shown by *TMX* and many other cases,³⁰ MPPAA withdrawal liability can take the entire equity of an enterprise.

The MPPAA's "interference with reasonable investment backed expectations" is beyond question. The MPPAA changes a company's obligations "in an area where the element of reliance was vital—the funding of a pension plan." *Allied Structural Steel*, *supra*, 438 U.S. at 246; see also *Arizona Governing Committee*, *supra*, 103 S. Ct. at 3510; *City of Los Angeles Department of Water & Power*, *supra*, 435 U.S. at 721. Prior to the MPPAA, Congress had only once attempted to impose new pension obligations on past employment relationships, and this Court had unanimously struck down that action in *Alton Railroad*. Only two years before the MPPAA was enacted, the Court had noted approvingly that ERISA, in making employers liable for part of the unfunded vested benefits of terminated single-employer pension plans, included grace periods and was not retroactive. *Allied Structural Steel*, *supra*, 438 U.S. at 247, 249 n.23. Thus, employers contributing

²⁹ The court below did not address the taking issue. See 705 F.2d at 1515.

³⁰ See, e.g., *Johnson Motor Lines, Inc. v. Central States Fund*, No. 81-C-3703 (N.D. Ill.) (total asserted liability in this and related cases of \$20.2 million against net assets of liquidated company and its parent of \$9.5 million); *Auclair Transp., Inc. v. Amaral*, No. 81-546-L (D.N.H.) (liability of \$2.5 million demanded from company with net liquidation proceeds of \$1.7 million).

to multiemployer funds had every reason to believe that the law would not countenance retroactive imposition of pension obligations on closed transactions.

The "character of the governmental action" represented by MPPAA is also apparent. The MPPAA decrees that one party shall pay an enormous sum of money to another. This is a clear taking of property by the government without compensation.³¹ Moreover, employers subjected to the provisions of the MPPAA did not have the means of avoiding or reducing the crippling penalty of withdrawal liability that Congress made available to firms that remained in a multiemployer fund after enactment of the MPPAA.³²

IV.

THE LOWER COURT DECISIONS RELIED UPON BY THE PBGC DO NOT SUPPORT THE CONSTITUTIONALITY OF RETROACTIVE MPPAA WITHDRAWAL LIABILITY

Rather than confronting the governing Supreme Court precedents discussed above, the PBGC relies heavily on lower court decisions sustaining a 1964 tax on purchases of foreign securities from foreign nationals. But the 1964 statute is not analogous to the MPPAA.

Retroactivity is common in the tax field; tax statutes raise revenues for the common good, rather than rewriting private bargains, and courts have accordingly recognized that retroactive tax statutes are "sui generis." *Shelter Framing, supra*, 543 F. Supp. at 1252. Moreover, the individuals taxed for purchasing foreign stocks from foreign owners in *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct. Cl.), *cert. denied*,

³¹ The seizure of all of a firm's equity, in the form of compulsory money payments, is unquestionably a taking. See, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). The contrary conclusion in the Seventh Circuit's *Peick* decision (Slip Op. at 50-53, *aff'd* 539 F. Supp. at 1040 n.30) is plain error.

³² These included attempting to renegotiate the trust agreement to limit benefit levels (*Peick, supra*, 539 F. Supp. at 1049); freeing themselves of liability by an exempt asset sale (ERISA § 4204, 29 U.S.C. § 1384); and reducing their participation in the fund gradually without incurring liability (*id.* § 4205, 29 U.S.C. § 1385).

398 U.S. 950 (1970),³³ had voluntarily entered into those transactions after being personally notified, pursuant to procedures jointly developed by the Treasury Department and the securities exchanges, that their purchases would be subject to the tax. *Id.* at 726-27. Furthermore, they were free to purchase the same securities on the same exchanges from domestic rather than foreign sellers without incurring the tax. *Id.* at 727. Employers like TMX, in contrast, became contractually bound to their multiemployer pension funds before the MPPAA was first proposed in Congress,³⁴ and the MPPAA did not provide them with any alternative that would have eliminated liability. Also in sharp contrast to the present circumstances, the need for retroactive enforcement of the 1964 tax law was spelled out with particularity in a Presidential proclamation,³⁵ and the effective date held essential by the President and publicized by the Treasury Department and the securities exchanges was the date actually enacted.

The issue in this case is not, as appellants would prefer to have it, whether Congress ever can, in cases of sufficient need, legislate retroactively to deal with serious harms accruing while a statute is being considered. Rather, the rare case in which Congress has enacted retroactive laws in response to such a clear need only underscores the absence of any such need here.

³³ The PBGC's reliance on *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), is misplaced; that was a criminal case involving a prosecution for *post-enactment* conduct.

³⁴ TMX and Bohren signed their Teamster contracts on April 1, 1979. The first of the bills that led to the MPPAA was introduced on May 3, 1979. 125 CONG. REC. 9643, 9800 (1979).

³⁵ The President described a critical short-term balance of payments crisis facing the nation which could be counteracted only by immediate effectiveness of the tax. *See Message from the President*, 109 CONG. REC. 12806, 12808-09 (1963) (describing "the flood of foreign securities sales in our markets" and explaining that "the effectiveness of this tax requires its immediate application").

V.

**THE UNCONSTITUTIONALITY OF RETROACTIVE
MPPAA WITHDRAWAL LIABILITY IS CONFIRMED
BY THE SEVENTH CIRCUIT'S FOUR-FACTOR
ANALYSIS IN *NACHMAN CORP. v. PBGC***

In *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir.), cert. denied on constitutional holding, 442 U.S. 940 (1979), aff'd on statutory holding, 446 U.S. 359 (1980), the Seventh Circuit weighed four factors in assessing the constitutionality of provisions of ERISA that render an employer terminating a single-employer pension plan partially liable for the unfunded vested benefits of the plan.³⁶ Those factors were: (1) the reliance interests of the parties; (2) the scope of prior regulation; (3) the equities of the burdens imposed by the statute; and (4) the extent to which the statute contains "provisions designed to limit and moderate the impact of the burden" it imposes. *Id.* at 960.

As *Nachman* recognized, the legislation at issue there was not purely retroactive, because it did not apply new burdens to closed transactions. *Id.* at 958. Rather, much like the statute at issue in *Turner Elkhorn*, the single-employer provisions of ERISA phased in new liabilities in stages spread over a period subsequent to enactment. See page 15 *supra*. ERISA imposed liability only on terminations of single-employer plans occurring after a four-month grace period following enactment but the statute had retrospective effects insofar as it altered the obligations of pre-existing contracts that were not renegotiated during this four-month period.

The court below—like virtually all lower courts that have considered the constitutionality of the withdrawal liability

³⁶ Those provisions differ from the withdrawal liability provisions of the MPPAA. They make the employer liable for only the portion of the plan's UVB guaranteed by the PBGC, ERISA § 4062(b), 29 U.S.C. § 1362(b), which may be considerably less than total UVB. For example, the PBGC guarantees at most a part—and may guarantee none—of benefits added within five years before plan termination. *Id.* § 4022(b)(7), 29 U.S.C. § 1322(b)(7). Also, liability is limited to 30 percent of employer net worth. *Id.* § 4062(b), 29 U.S.C. § 1362(b).

provisions of the MPPAA—applied the *Nachman* factors to arrive at its conclusion. While the PBGC vigorously opposes such an analysis, it misapprehends the roots and purpose of the *Nachman* approach. That opinion, and the ones that have applied its theory, merely seek to organize for analytical purposes the various factors that this Court considered in *Turner Elkhorn*, *Allied Structural Steel*, *Alton Railroad* and other cases in judging the constitutionality of retrospective legislation. The fidelity of the *Nachman* factors to this Court's modern constitutional decisions is beyond challenge, even though it may fairly be debated whether so complex an analysis is necessary in reviewing the imposition of MPPAA withdrawal liability on transactions completely performed prior to the enactment of the statute.

Amici suggest that it is not necessary to invoke the analytical framework of *Nachman* because the impact of retroactive MPPAA withdrawal liability on closed transactions is so much harsher than the impact of the prospectively-effective single-employer provision of ERISA.³⁷ Nonetheless, it is clear that retroactive MPPAA withdrawal liability is unconstitutional under the *Nachman* analysis. This is confirmed by the decision below, which applies the *Nachman* factors to strike down retroactive withdrawal liability. The contrary rulings of

³⁷ Fully-retroactive statutes, such as the retroactive withdrawal liability provisions of the MPPAA, are much more severe in their consequences than prospective legislation having effects on executory contracts. Employers who were participating in multiemployer funds at the date of enactment of the MPPAA were able to avoid withdrawal liability altogether or reduce their potential liability (*see note 32 supra*), whereas companies like Gray and TMX had no such options. Moreover, a prohibition of retroactive legislation does not restrict the power of Congress to legislate prospectively, whereas barring the legislature from regulating executory contracts would confer on private persons a potentially unlimited power to "pre-empt" legislative authority. *See, e.g., Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2305-06 & n.12 (1983); *Norman v. Baltimore & O. R.R.*, 294 U.S. 240, 304-11 (1935); *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482 (1911); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

the Fourth and Seventh Circuits in the *Republic*³⁸ and *Peick*³⁹ cases are based on a mistaken application of the *Nachman* factors.⁴⁰

A. Reliance

There is no doubt that MPPAA withdrawal liability severely invades the reliance that employers placed on the terms of the labor agreements they entered into well before the statute was enacted. The statute imposes a new obligation in derogation of those contracts. That obligation can consume the entire net worth of the employer, and must be paid even to multiemployer funds that are so strong financially that there is no chance they will ever need the money.

By contrast, the employee beneficiaries of a multiemployer fund have no significant reliance interest at stake. Those

³⁸ *Republic Industries, Inc. v. Teamsters Council 83 Fund*, 718 F.2d 628 (4th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3292 (U.S. Sept. 29, 1983) (No. 83-541).

³⁹ *Peick v. PBGC*, 4 Empl. Ben. Cases (BNA) 2473 (7th Cir. 1983).

⁴⁰ The threshold question asked in *Nachman* was whether there was a need for "the retroactive effects as a means of achieving the Congressional purpose." 592 F.2d at 958. See also *Turner Elkhorn*, *supra*, 428 U.S. at 17. Whatever else can be said for the MPPAA, its retroactivity cannot be sustained if it was not demonstrably "necessary to achieve the legislative purpose." *Nachman*, *supra*, 592 F.2d at 962. The committee reports on the MPPAA, which were issued when the bill contained a retroactive effective date of February 27, 1979, simply recite that date, without explaining the effort to attach liability to closed transactions. See note 22 *supra*. In advancing the effective date of the MPPAA to April 29, 1980 to benefit politically powerful employers, Congress itself conclusively rebutted any notion that retroactivity was needed to deter or penalize withdrawals occurring while the statute was under consideration. See also *Turner Elkhorn*, *supra*, 428 U.S. at 17-18 (suggesting that, in any event, "deterrence" or "blameworthiness" would not have been permissible purposes for retrospective lawmaking). As noted at page 13 *supra*, not a word in the legislative history of the MPPAA establishes a need for the five months of retroactivity that were retained. And in no event would any concept of deterrence justify application of the MPPAA to employers such as *amici*, whose decision to shut down was made, announced and acted upon prior to the disclosure on April 29, 1980 (126 CONG. REC. 9236-37 (remarks of Sen. Bentsen)) that the statute would apply to any withdrawal occurring after April 28, 1980.

beneficiaries neither received nor relied on any promises by the employer, other than to make specified contributions to the fund—contributions that were duly made. Employees knew from the outset that the multiemployer funds to which they looked for pension benefits were specifically designed to continue as some employers withdrew and new employers entered. As the PBGC itself has noted, the entire point of these funds is to provide pensions in industries where employers come and go, and to enable employees to continue to accrue eligible service toward pensions as they change employers. PBGC, *MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214*, at 20-21 (1978); see also *Republic*, *supra*, 718 F.2d at 632 n.1.

When MPPAA withdrawal liability is imposed on *pre-enactment* withdrawals, the balance of reliance interests decisively favors the employer. Employers who withdrew before enactment not only relied on the terms of a contract; they relied on the finality of a closed transaction, as TMX and Bohren did in taking irreversible steps to close their businesses. In contrast, their employees never relied on a single commitment or expectation other than those that the employers completely and faithfully fulfilled.

Thus, as the court below concluded (705 F.2d at 1511-12), retroactive enforcement of MPPAA withdrawal liability severely invades the reliance interests of the affected employers and furthers no countervailing reliance interest of employees. The *Republic* (718 F.2d at 638) and *Peick* (Slip Op. at 43-44) decisions simply err in asserting that employers promised pensions, rather than agreed-upon contributions. The employers in fact did not make such promises, and their employees, and the unions that represented them, fully understood this.

B. Prior Regulation

The *Nachman* court properly treated the question of prior regulation as a minor and subsidiary aspect of the reliance issue. 592 F.2d at 962 & n.33; accord, *Shelter Framing*, *supra*, 543 F. Supp. at 1251. Where, as here, the balance of reliance interests overwhelmingly points to a statute's unconstitutionality, the existence of some modest prior regulation in

the same general area will not change that result. See, e.g., *Allied Structural Steel, supra*, 438 U.S. at 249-50 (state pension law struck down despite prior federal pension regulation); *Lynch, supra* (repudiation of war risk insurance policies held unconstitutional despite previous regulation).

Before the MPPAA, withdrawal from a multiemployer plan did not give rise to liability. Only termination of a multiemployer plan—an extraordinarily rare event—resulted in statutory liability, and then the liability was shared by all employers involved in the plan, including those who had withdrawn within five years of termination. By imposing liability on withdrawals—even if, as in this case (see JA 74) and *TMX*, the multiemployer fund faces no prospect of ever terminating—the MPPAA created a totally new liability.⁴¹

This change is particularly harsh as applied to pre-enactment withdrawals. As the district court stated below (543 F. Supp. at 1251), and the Ninth Circuit confirmed (705 F.2d at 1512), employers “could not reasonably have foreseen a change of this scope and nature in the regulation of the field, especially when applied on a totally retroactive basis.” *Accord, Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928).

Before the MPPAA, the one effort Congress had made to enact a retroactive pension statute had been unanimously overturned by the Supreme Court. Congress had carefully avoided retroactive application of ERISA, and had been praised by this Court in 1978 for that action. *Allied Structural Steel, supra*, 438 U.S. at 247, 249 n.23.⁴² Employers thus had every right to rely on the complete absence of any prior regulation of closed transactions. Neither *Republic* (718 F.2d at 638) nor *Peick* (Slip Op. at 44) recognizes this absence of

⁴¹ Thus, this is not a case where existing regulation has merely been clarified or prospectively modified. See *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940), analyzed by both the district court (543 F. Supp. at 1251) and the court of appeals (705 F.2d at 1512) below.

⁴² The Black Lung Act similarly refrained from imposing liability on employers who had left the business before enactment. See *Turner Elkhorn, supra*, 428 U.S. at 8-10.

any prior regulation of closed transactions in the pension field, or of any imposition of liability in the absence of termination of a pension plan.

C. The Equities

The relevant equities strongly point to the unconstitutionality of retroactive MPPAA withdrawal liability. It cannot possibly be equitable to make an employer responsible for a fund's UVB when the governing contracts and legal principles (*NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981)) placed exclusive control over benefit levels, investment policies and fund administration in the hands of the fund's trustees. In contrast, the employer who established a single-employer defined benefit plan, as in *Nachman*, agreed to pay a pension in a specified amount regardless of cost, and also retained the right to manage the investment of the funds it contributed to the plan. As the Ninth Circuit held (705 F.2d at 1512-14), these factors make the withdrawal liability provisions of the MPPAA fundamentally different from the single-employer plan termination provision of ERISA that were sustained in *Nachman* and the black lung provisions that were sustained in *Turner Elk-horn*, and make the MPPAA indistinguishable from the laws that were struck down in *Alton Railroad* and *Allied Structural Steel*. The *Republic* (718 F.2d at 638-39) and *Peick* (Slip Op. at 464-47) decisions sustain retroactive withdrawal liability only by ignoring these fundamental differences.

Moreover, the equities of employers that withdrew before enactment are unique—they had none of the options available to employers that continued after enactment to participate in a fund (*see note 32 supra*), and thus were arbitrarily singled out "to bear a very disproportionate burden." *Shelter Framing, supra*, 543 F. Supp. at 1253.

D. Moderating Features

The absence of any meaningful mitigation of retroactive MPPAA withdrawal liability is, in the words of the Ninth Circuit (705 F.2d at 1514), "the most significant distinction" between that liability and the single-employer liability upheld in *Nachman*.

The MPPAA contains none of the significant moderating features that the *Nachman* court held crucial in sustaining the single-employer plan termination provisions of ERISA (592 F.2d at 962-63), and that this Court found to distinguish ERISA from the state pension statute struck down in *Allied Structural Steel* (438 U.S. at 247, 249 n.23). Rather than imposing liability after a four-month grace period as in ERISA or a 3½ year period as in the Black Lung Act, the MPPAA is nakedly retroactive. Instead of basing liability on a limited portion of UVB as calculated by the PBGC under the single-employer provisions of ERISA (*see* notes 9 & 36 *supra*), the MPPAA bases liability on the full amount of a fund's UVB as computed by the self-interested claimant fund itself (ERISA §§ 4201(b)(1), 4202, 4211, 29 U.S.C. §§ 1381(b)(1), 1382, 1391). Instead of limiting liability to 30 percent of the employer's net worth (*id.* § 4062(b), 29 U.S.C. § 1362(b)), the MPPAA provides for liability up to the full value of an employer's business (*id.* § 4225(b), 29 U.S.C. § 1405(b)). Instead of providing for insurance against liability for all employers (*Nachman*, 592 F.2d at 963), the MPPAA offers only the inchoate possibility of a so-called "withdrawal liability payment fund" (ERISA § 4223, 29 U.S.C. § 1403), which if ever established, would be available only to assist employers withdrawing after enactment of the statute. Instead of "reasonable terms for the payment of liability" (*Nachman*, 592 F.2d at 963), the MPPAA's installment-payment scheme can require payment over a period of twenty years at a rate exceeding the employer's contributions when it was a going concern participating in the fund (ERISA § 4219(c)(1), 29 U.S.C. § 1399(c)(1)); in *amici's* case, for example, the demand is for payments for more than six years exceeding in annual amounts the largest contributions they ever made as going concerns.

Nor do any other features of the MPPAA provide any genuine moderation. The *de minimis* exemption (*id.* § 4209, 29 U.S.C. § 1389) simply reallocates liability from one employer to another (*see, e.g., id.* § 4211(b)(1)(C), (b)(4), (c)(5)(B), 29 U.S.C. § 1391(b)(1)(C), (b)(4), (c)(5)(B)). Limited exemptions for certain asset sales and some trucking construc-

tion and entertainment industry funds (*id.* §§ 4203(b)-(d), 4204, 29 U.S.C. §§ 1383(b)-(d), 1384) simply point up the unfair treatment of nonexempt employers; they do not apply evenhandedly to reduce all employers' liability as do the key ERISA moderating features cited in *Nachman*. And the theoretical right to reenter a fund (*id.* § 4207(b), 29 U.S.C. § 1387(b)) is meaningless for employers that, like TMX, have irrevocably closed their business, or for employers that as a consequence of union decertification, property condemnation, or other causes have no power to reverse their withdrawals.

Also, any notion that Congress "spread the pain around" (*Peick*, 539 F. Supp. at 1052) is simply mistaken. Provisions in the MPPAA for limited reductions in guaranteed benefits of distressed multiemployer funds, PBGC subsidies to insolvent plans, and higher insurance premiums (*id.* at 1051-52) do nothing to reduce the UVB figure that is the basis for withdrawal liability assessments; accelerated funding (*id.* at 1051) can reduce UVB in the future, but only at the expense, dollar for dollar, of the same employers that the MPPAA makes liable for that future UVB.

When withdrawal liability is imposed, as here, on pre-enactment withdrawals, there is, as the court below recognized (705 F.2d at 1514-15), no meaningful moderation whatever. This absence of any mitigation of liability for pre-enactment withdrawals is overlooked entirely in the *Republic* (718 F.2d at 639) and *Peick* (Slip Op. at 47-48) decisions.

In sum, all four of the *Nachman* factors point to the unconstitutionality of exacting MPPAA withdrawal liability for pre-enactment withdrawals.

CONCLUSION

This Court should affirm the decision of the court of appeals, and hold that MPPAA withdrawal liability unconstitutional as imposed on pre-enactment withdrawals.

Respectfully submitted,

HARRIS WEINSTEIN*

ARVID E. ROACH II

Covington & Burling

1201 Pennsylvania Avenue, N.W.

P. O. Box 7566

Washington, D.C. 20044

(202) 662-5302

Attorneys for *Amici Curiae*

Transport Motor Express, Inc.,

E. W. Bohren Transport, Inc.,

and Essex Group, Inc.

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* Counsel of Record.

CERTIFICATE OF SERVICE

I certify that on this 11th day of January, 1984, I served two copies of the foregoing motion and brief by first class mail on each of the following counsel:

HENRY ROSE, ESQ.
General Counsel
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

THOMAS M. TRIPLETT, ESQ.
Schwabe, Williamson, Wyatt, Moore & Roberts
1200 Standard Plaza
110 S.W. Sixth Avenue
Portland, Oregon 97204

WILLIAM B. CROW, ESQ.
Miller, Nash, Yerke, Wiener & Hager
900 S.W. Fifth Avenue
Portland, Oregon 97204

DAVID S. PAULL, ESQ.
Bailey & Paull
5441 S.W. Macadam Avenue
Portland, Oregon 97201

ARVID E. ROACH II

CASE NBR 83-1-00245 AFX

SHORT TITLE Pension Benefit Guar. Corp.

DOCKETED: Aug 15 1983

VERSUS R. A. Gray & Co.

Date	Proceedings and Orders
Aug 15 1983	Statement as to Jurisdiction filed.
Sep 15 1983	Motion of appellee R.A. Gray & Co. to affirm filed. VIDE.
Sep 21 1983	DISTRIBUTED. October 7, 1983
Sep 14 1983	Motion of G & R Roofing Company for leave to file a brief as amicus curiae in No. 83-245 filed.
Sep 14 1983	Supplement to brief of amicus curiae of G & R Roofing company.
Oct 3 1983	DIST. 10/7/83. (Motion of G & R Roofing Co. for leave to file a brief as amicus curiae in No. 83-245).
Oct 11 1983	REDISTRIBUTED. October 14, 1983
Oct 17 1983	Motion of G & R Roofing Company for leave to file a brief as GRANTED.
Oct 17 1983	PROBABLE JURISDICTION NOTED. The case is consolidated with 83-291, and a total of one hour is allotted for oral argument.
Oct 17 1983	PROBABLE JURISDICTION NOTED. The case is consolidated with 83-291, and a total of one hour is allotted for oral argument.
Nov 3 1983	Record filed.
Nov 3 1983	Certified original record & C.A. proceedings, 9 volumes received.
Nov 23 1983	Order extending time to file brief of appellant on the merits until December 12, 1983.
Dec 12 1983	Brief amicus curiae of NCCMP filed.
Dec 12 1983	Joint appendix filed. VIDE.
Dec 12 1983	Brief of appellant Pension Benefit Guar. Corp. filed. VIDE.
Dec 14 1983	Brief of appellant OR-WA Carpenters-Employers filed. VIDE.
Jan 6 1984	Brief amicus curiae of Natl. Assn. of Wholesaler-Distributors filed.
Jan 11 1984	Brief amicus curiae of National Association of Manufacturers filed.
Jan 11 1984	Brief amici curiae of Trans. Motor Express, et al. filed. VIDE.
Jan 11 1984	Brief amicus curiae of G & R Roofing Company filed. VIDE.
Jan 11 1984	Brief amicus curiae of Chamber of Commerce of the United States filed. VIDE.
Jan 11 1984	Brief of appellee R.A. Gray & Co. filed. VIDE.
Jan 10 1984	Brief amicus curiae of National-American Wholesale Grocers' Association filed.
Jan 11 1984	Brief amicus curiae of Sibley, Lindsay and Curr Company filed.
Jan 11 1984	Brief amicus curiae of Republic Industries, Inc. filed.
Jan 11 1984	Brief amicus curiae of National Steel Service Center, Inc. filed.
Mar 20 1984	SET FOR ARGUMENT. Monday, April 16, 1984. This case is consolidated with case No. 83-291. (1 hour) (1st case).
Mar 22 1984	Reply brief of appellant Pension Benefit Guar. Corp. filed. VIDE.
Mar 23 1984	Reply brief of appellant OR-WA Carpenters-Employers Pension Trust Fund filed. VIDE.
Mar 26 1984	CIRCULATED.
Apr 16 1984	ARGUED.